Supreme Court, U.S.
FILED

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No. 98 529 SEP 29 1998

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In the

Supreme Court of the United States

October Term, 1997

COLLEEN V. FORD,

Petitioner,

-v-

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIAN J. MOLLOY, ESQUIRE
Counsel of Record
MAUREEN S. BINETTI, ESQUIRE
CHRISTOPHER W. HAGER, ESQUIRE
Wilentz Goldman & Spitzer
90 Woodbridge Center Drive
Suite 900 Box 10
Woodbridge, NJ 07095-0958
☎(732) 636-8000
Attorneys for Petitioner

Appellate Service: Curry & Taylor (800) 222-8738/Appellate@webtv.com

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Questions Presented

This petition for a writ of certiorari, brought under the Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (hereinafter "ADA"), challenges the lawfulness of a private entity offering long-term disability insurance that provides lesser benefits to qualified individuals with **mental** disabilities than are provided under the same plan to those with **physical** disabilities. The disability-based nature of this distinction presents this Court with the following questions:

I. Whether Title III of the ADA prohibits discrimination against qualified individuals with disabilities in the contents of goods and services, including insurance products, offered by a "public accommodation", as well as the manner in which such goods and services are accessed.

II. Whether the ADA prohibits discrimination in a disability insurance plan in the benefits offered to mentally and physically disabled individuals covered under the same plan.

III. Whether Title V of the ADA requires a private entity offering disability insurance to support a disability-based distinction made in its insurance product with competent evidence that the distinction is consistent with sound actuarial principles, reasonably anticipated experience, and bona fide risk classifications.

Parties to the Proceedings

The Petitioner, Colleen V. Ford (hereinafter "Petitioner" or "Ford"), is a New Jersey resident. Petitioner was the Plaintiff before the United States District Court for the District of New Jersey, and the Appellant before the United States Court of Appeals for the Third Circuit.

Respondent Metropolitan Life Insurance Company (hereinafter "MetLife") is an insurance company doing business in the State of New Jersey. Respondents Schering-Plough Corporation, and Schering Corporation (collectively "Schering-Plough") are corporations doing business in the State of New Jersey. All Respondents were the Defendants before the United States District Court for the District of New Jersey, and the Appellees before the United States Court of Appeals for the Third Circuit.

There are no other parties to this action.

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Opinions Below

The opinion of the Third Circuit (App., *infra*, 1a) is reported as *Ford v. Schering-Plough Corp. et al.*, 145 F.3d 601 (3d Cir. 1998); *reh'g denied, Ford v. Schering-Plough Corp. et al.*, Case No. 96-5674 (3d Cir. June 30, 1998) (App., *infra*, 50a). The unreported decision of the district court (App., *infra*, 37a) is cited as *Ford v. Schering-Plough Corp. et al.*, Case No. 96-1991 (D.N.J. 1996).

Basis for Jurisdiction in this Court

The United States Court of Appeals for the Third Circuit entered its judgment on May 22, 1998. The order of the United States Court of Appeals for the Third Circuit denying a petition for rehearing in banc was entered on June 30, 1998. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

The Statutes in Question

42 U.S.C. §12101(b)
42 U.S.C. §12102(2)
42 U.S.C. §12112(a)
42 U.S.C. §12112(b)
42 U.S.C. §12181(7)(F)
42 U.S.C. §12182(a)
42 U.S.C. §12182(b)
42 U.S.C. §12201(c)

(*See* Exhibit E)

Statement of the Case

This petition for a writ of certiorari should be granted to resolve a question of exceptional importance: whether a complaint alleging violations of the Americans with Disabilities Act ("ADA") may be dismissed, as a matter of law, where an employer-sponsored long term disability insurance plan accords less favorable benefits to mentally disabled employees than to physically disabled employees. The importance of this question, which implicates the significant remedial policies underlying the ADA, is heightened by the split in the circuits which have addressed identical and very similar issues thus far. The Sixth and Seventh Circuits, and a panel of the Third Circuit, have determined that such a distinction does not violate the ADA (although not without a strong dissent from the Chief Judge of the Sixth Circuit), while the First Circuit (and a District Court within the Fourth Circuit) have allowed such claims to proceed.

Petitioner was an employee of Schering-Plough from 1975 until May of 1992, when she became totally disabled due to a mental impairment. During her employment, petitioner enrolled in a long-term disability benefits plan provided by Schering-Plough through MetLife. Although the plan provided benefits for a **physically disabled** employee until such employee reached the age of 65, it imposed a cap of two years on benefits for a **mentally disabled** employee who was not hospitalized. Petitioner was mentally disabled and not hospitalized. Consequently, the long-term disability coverage provided to her by Schering-Plough and MetLife expired in 1994, two years after it began.

By complaint filed on April 29, 1996, Petitioner brought suit under Titles I, III, and V of the ADA based upon the Respondents' discrimination against individuals

with "mental or nervous" disabilities (as defined and interpreted by Respondents Schering-Plough and Metlife) in the provision of long-term disability benefits. On September 12, 1996, the District Court for the District of New Jersey granted the Respondents' motion to dismiss Petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6).

Petitioner appealed to the Third Circuit, and a three judge panel reversed the district court decision as to Petitioner's standing by holding that although Petitioner was no longer able to work when her long-term disability coverage was terminated, she nevertheless was a "qualified individual with a disability" under Title I of the ADA who met its threshold requirements. (App., *infra*, 12a-13a). Despite holding that Petitioner was eligible to sue for discrimination under Title I of the ADA, the Third Circuit concluded that Petitioner did not state a claim under the ADA because the statute "does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA." (App., *infra*, 15a). The majority also concluded that Petitioner failed to state a claim under Title III of the ADA because this title governs only access to the **physical structure** of a "public accommodation", an interpretation of Title III which creates a split in the circuits by parting with the First Circuit, while effectively excluding insurance contracts from the scrutiny of the ADA. (App., *infra*, 28a).

Finally, the Third Circuit held that disability insurers are not required by the ADA to support their disability-based insurance decisions with competent evidence. (App., *infra*, 20a-24a). On June 30, 1998, Ford's petition for rehearing *en banc* was denied by the Third Circuit. (App., *infra*, 50a).

Argument in Support of Petition

I. The Third Circuit's Strict Construction That Title III of the ADA Affords Disabled Individuals With Only Equal Physical Access to "Public Accommodations", such as Insurance Offices, Directly Conflicts with the First Circuit, as well as the Department of Justice's Regulations and Interpretation of the ADA, Holding That the ADA Covers Access to Insurance Through Public Accommodations Other Than Physical Structures, and That it Prohibits Discrimination Based On Disability Not Only in How the Goods and Services of Insurance Offices are Accessed, but also in the Terms and Conditions of Those Goods and Services.

A primary purpose of Title III of the ADA is "to bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced and reasonable manner." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382. To achieve this remedial purpose, the Title III of the ADA provides that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases or leases to, or operates a place of public accommodation.

42 U.S.C. § 12182(a). The Third Circuit applied an overly restrictive interpretation of these remedial provisions to arrive at a conclusion contrary to the statute's intent.

A. The Third Circuit's Holding that Title III of the ADA Only Refers to Equally Accessing Public Accommodations Which are Physical Places or Structures Splits with the First Circuit's Holding on This Issue.

The Third Circuit narrowly construed the broad "public accommodations" language of Title III to apply only to physically accessing places or structures. (App., *infra*, 24a-29a). This "[r]estricting" and "[c]onfining" interpretation of a Title III "public accommodation" belies the ADA's remedial intent. (App., *infra*, 26a-27a). Moreover, this narrow construction splits with the First Circuit's interpretation that the ADA requires a broad construction of "public accommodation." *See Carparts Dist. Ctr., Inc. v. Automotive Wholesalers Assoc. of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994); (*see also* App., *infra*, 28a).

Congress worded Title III more broadly to guarantee the full and equal enjoyment not only of public accommodations, but also of the "goods, services, . . . privileges [and] advantages" of any place of public accommodation. 42 U.S.C. § 12182(a). Interpreting Title III to guarantee only physical accessibility to public accommodations renders superfluous the statute's use of the terms "goods," "services," "privileges," and "advantages," thereby violating a basic cannon of statutory construction. *See United States v. Alaska*, 117 S. Ct. 1888, 1918 (1997)(courts must avoid an interpretation that renders words in a statute redundant or superfluous). The

First Circuit's decision in *Carparts* properly interpreted, and applied, Title III.

In *Carparts*, a plaintiff challenged the lifetime benefit limitation in a health plan which applied to AIDS-related illnesses only. The defendants argued that Title III related only to physical access to public accommodations and did not prohibit disability-based insurance plans. After performing an exhaustive analysis of the statute, the legislative history, the ADA's plain language, and last, but not least, applying logic, the First Circuit determined that "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result". *Id.* at 19. The court explained as follows:

> The plain meaning of the terms do not require 'public accommodations' to have physical structures for persons to enter. Even if the meaning of 'public accommodation' is not plain it is, at worst, ambiguous. This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures.

Id.

Thus, the First Circuit concluded in *Carparts* that the district court erred in finding that neither the employment nor the public accommodations provisions of the ADA applied to the defendants [administrators/operators of the benefit plan at issue], and in dismissing plaintiff's ADA claims:

> Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. **To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages available indiscriminately to other members of the general public.**

Id. at 20. [Emphasis Added]. *See also Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316 (C.D. Cal. 1996)(holding that Title III protections clearly extend beyond denial of physical access); *Baker v. Hartford Life Ins. Co.*, 1995 WL 573430 (N.D. Ill. Sept. 28, 1995)(holding that the ADA does not require a plaintiff to be physically present at the place of public accommodation to be entitled to non-discriminatory treatment). As aptly stated in *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422 (D.N.H. 1996), "[t]here can hardly be a 'good' or 'service' more central to the day-to-day life of a seriously disabled person than insurance--for it is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society." *Id.* at 427.

The court below reviewed the provisions of 42 U.S.C. § 12181(7) and acknowledged that an "insurance office" is a "public accommodation" (App., *infra*, 25a); however, since "Ford received her disability benefits via her employer at Schering, she had no nexus to MetLife's 'insurance office' and thus was not discriminated against in connection with a public accommodation." (App., *infra*, 26a). Through such reasoning, the Third Circuit concluded that Petitioner's long-term disability benefits were not covered by Title III of the ADA because they were provided through her employer, Schering-Plough, and administered by an insurance company, MetLife, in a way that did not involve the use of a physical place (*i.e.*, an insurance office). (App., *infra*, *id.*). By following this strained construction of Title III, the court below concluded that Petitioner's disability benefits also did not fall within the statute because "[t]he plain meaning of Title III is that a public accommodation is a place . . . ." (App., *infra*, 26a).

By denying Petitioner relief under the statute, the Third Circuit simply chose not to follow the well settled principle that remedial statutes, such as the ADA, are to be interpreted broadly to effectuate their intent. *See, e.g., Jefferson County Pharmaceutical Assn v. Abbott Labs.*, 460 U.S. 150, 159 (1983); *Gomez v. Toledo*, 446 U.S. 635, 639 (1980). This Court should grant Petitioner's petition to correct the Third Circuit's erroneous construction of Title III of the ADA.

B. The Third Circuit's Narrow Interpretation of Title III to Exclude the Terms and Conditions of Disability Benefits Provided by A Public Accommodation (*i.e.*, an insurance office) is Contrary to the First Circuit's Decision in *Carparts*, and the Department of Justice's Interpretation of Title III.

The Third Circuit held that Title III did not reach the disability benefits offered by the insurance office public accommodation, reasoning that "'[i]t is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers[,] which fall within the scope of Title III.'" (App., *infra*, 26a) (quoting *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) (*en banc*) (quoting, in turn, *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995)). The *Stoutenborough* decision quoted by the *Parker en banc* majority involved a hearing impaired plaintiff's complaint that the National Football League's "blackout rule" denied hearing impaired people equal access to football games that would otherwise be available through local live telecasts. The Sixth Circuit in *Stoutenborough* ruled that the broadcasts did not involve a place of public accommodation. 59 F.3d at 582-83.

In *Parker*, however, the author of *Stoutenborough*, Judge Boyce Martin, dissented from the *en banc* majority on the grounds that the *Parker* majority incorrectly applied *Stoutenborough* because *Parker* involved goods or services (*i.e.*, insurance benefits) available through one of the places of public accommodation specifically listed in the statute. *See Parker*, 121 F.3d at 1019. The Third Circuit's decision that Title III does not reach the terms and conditions of disability

benefits offered by a specifically listed public accommodation, which relies on *Parker's* misapplication of *Stoutenborough*, directly conflicts with the interpretation given to Title III on this issue by courts following the reasoning of *Carparts*, and also by the Department of Justice (the latter of these two divergences will be discussed *infra*).

In *Carparts*, the First Circuit addressed the goods and services issue under Title III as follows:

> By including "travel service" among the list of services considered 'public accommodations,' Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure.

37 F.3d at 19.

By so reasoning, *Carparts* did not preclude regulation of the terms and conditions of insurance products under Title III, a conclusion supported by the decision in *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422, 426 (D.N.H. 1996) that, pursuant to *Carparts*, the expansive provisions of Title III "are a strong indication that Title III was intended to extend beyond mere access or availability of a good or service." *Id.* This point was articulated further in a recent, well-reasoned opinion by the District Court for the Northern District of California as follows:

> Nothing within the plain language of the statute lends itself to such a narrow reading. The statute's general prohibitions ban the discriminatory "denial of the opportunity . . . to participate in or benefit from the goods, services,

> facilities, privileges, advantages, or accommodations of an entity." 42 U.S.C. § 12182(b)(1)(A)(i). . . . Interpreting Title III to prohibit only physical barriers to the access of "facilities" would dispense with the language mandating equal opportunity to "participate in or benefit from" the "goods," "services," "privileges," and "advantages" of a commercial transaction. Equally telling, Title III's specific prohibitions against discriminatory "application of eligibility criteria," "failure to make reasonable modifications in policies, practices, or procedures, "and" failure to take such steps . . . to ensure that no individual with a disability is excluded, denied services, or otherwise treated differently," could easily apply to the case of an insurer's rejection of a prospective customer without any physical barriers to access. 42 U.S.C. § 12182(b)(2)(A)(i-iii).

Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299, 302 (N.D. Cal. 1997).

Cloutier's reasoning is consistent with the First Circuit's thoughtful analysis in *Carparts* that the inclusion of a "travel service" among the statutorily listed examples of a "public accommodation" shows that Congress intended for such to "include providers of services which do not require a person to physically enter an actual physical structure." *Carparts*, 37 F.3d at 19.

Further support for Congress' intent to cover the terms and conditions of disability insurance under the ADA is found in Title V of the Act, specifically entitled "Insurance," which provides a "safe harbor" for certain insurance

practices that would otherwise violate the ADA with the following pertinent language:

> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict –
>
> (1) an insurer . . . or any agent, or entity that administers benefit plans . . . from un derwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

42 U.S.C. § 12201(c).[1] A reasonable inference to be drawn from this language is that Congress intended for the contents of insurance products to be subject to Titles I through III of the ADA, otherwise there would have been no need to expressly exempt through a "safe harbor" those insurance practices that may be discriminatory under Title III. *See Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1321 (C.D. Cal. 1996).

By aligning itself on the Title III issue with the Sixth Circuit's *en banc* majority in *Parker*, the Third Circuit acknowledged that it was "part[ing] company with the First

1 The Third Circuit concluded that it was bound by the McCarran-Ferguson Act to affirm the dismissal of Petitioner's ADA claim. (App., *infra*, 24a). According to that Act, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012(b). On a perceived basis that the ADA "does not 'specifically relate to the business of insurance,'" (App., *infra*, 24a), the Third Circuit concluded that Petitioner could not state her claim under the ADA. This conclusion is puzzling, however, in light of the title of ADA Title V – "Insurance." 42 U.S.C.§ 12201(c).

Circuit" holding in *Carparts* "that Title III is not limited to physical structures . . . [through its] inclusion of `travel service' in the list of public accommodations . . . ." (App., *infra*, 28a). However, the First Circuit is not the only court to analyze the applicability of the ADA to discrimination in the provision and coverage of insurance. *See, e.g., Chabner v. United Omaha Life Ins. Co.*, 994 F. Supp. 1185 (N.D. Cal. 1998); *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1163-65 (E.D. Va. 1997); *Attar v. Unum Life Ins. Co.*, 1997 WL 446439 at *11-12 (N.D. Tex. 1997); *World Ins. Co. v. Branch*, 966 F. Supp. 1203, 1207 (N.D. Ga. 1997); *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299, 301-02 (N.D. Cal. 1997); *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422, 425-27 (D.N.H. 1996); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1321-23 (C.D. Cal. 1996); *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763 (E.D. Tex. 1996); *Piquard v. City of East Peoria*, 887 F. Supp. 1106 (C.D. Ill. 1995); and *Baker v. Hartford Life Ins. Co.*, 1995 WL 573430 (N.D. Ill. 1995). Each of these cases held that Title III reaches disability-based discrimination in the terms and conditions of insurance products, including those provided through employer-sponsored group benefits plans (*i.e., Anderson and Piquard*). In addition to these district court holdings is the position consistently taken on this issue by the Department of Justice.

As the agency authorized by Congress to interpret Title III, the Department of Justice has concluded that insurance offices, as a place of "public accommodation," "may not discriminate on the basis of disability in the . . . terms or conditions of the insurance contracts they offer." *See* Dept. of Justice, *Title III Technical Assistance Manual: Covering Public Accommodations and Commercial Facilities*, § III-3.11000, at 19 (Nov. 1993). The Department of Justice's regulations and interpretive guidance pertaining to the Title III issues must

be given "legislative, and hence controlling, weight unless they are arbitrary, capricious or clearly contrary to the statute." *See, e.g., United States v. Morton*, 467 U.S. 822, 834 (1984). Indeed, the Technical Assistance Manual is entitled to substantial deference. *See, e.g., Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 n.8 (2d Cir. 1997). Without any discussion as to how it arrived at its conclusion, the Third Circuit concluded that the Department of Justice's position that the terms and conditions of insurance products are governed by Title III was "'manifestly contrary' to the plain meaning of Title III." (App., *infra*, 28a). This Court should exercise its supervisory authority and grant the writ sought by Petitioner in this case to rectify the Third Circuit's failure to give due deference to the Department of Justice's regulations and interpretation of Title III.

In summary, the Third Circuit's decision eviscerates the heart of Title III of the ADA, effectively insulates insurers' discriminatory practices from the reach of this statute, and stands in stark contrast to the just approach of the First Circuit and subsequent courts embracing its reasoning. Due to the split between the First and Third Circuits (as well as the First and Sixth Circuits on this issue), this Court is presented with the opportunity to address these ADA issues in order to settle the law in this area, and serve the manner with which justice will be administered in future ADA cases raising these issues.

II. The Third Circuit's Holding That the ADA is Not Violated By Disparities in Benefits Between Mentally and Physically Disabled Individuals Insured Under the Same Plan, Which is Plainly a Disability-Based Distinction, is Contrary to the ADA's Express Purpose Prohibiting Such Distinctions From Being Made.

As indicated above, the Third Circuit held that distinguishing between individuals with different disabilities for insurance purposes is not, as a matter of law, discrimination based on disability. (App., *infra*, 15a). In particular, the court held that although the benefits plan "differentiated between types of disabilities, ... [e]very Schering employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every Schering employee received equal treatment." (App., *infra*, *id.*). The court added that "[s]o long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities." (App., *infra*, *id.*).

What this reasoning and conclusion ignores, however, is the simple fact that mentally disabled employees were singled out **as a group** under the plan to receive less favorable disability benefits than physically disabled employees. Such a distinction is clearly **based upon** disability and, as a result, violates the ADA's prohibition against **disability-based** distinctions. This conclusion finds further support in Judge Alito's concurrence below that "it would seem that [distinguishing between people with different disabilities for insurance purposes] does constitute discrimination in the most basic sense of the word." (App., *infra*, 34a)(quoting

Webster's Third New International Dictionary, at 648, for the definition of "discrimination").

Congress enacted the ADA in 1990 as a sweeping mandate to end discrimination against individuals with disabilities. Among other reasons, the stated purpose of the statute is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [by] invok[ing] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(1),(4). As it relates to a disparity in disability insurance benefits, the ADA provides in relevant part as follows:

> It shall be discriminatory to subject an individual or **class of individuals** on the basis of a disability or disabilities of such individual or class, directly, **or through contractual**, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

42 U.S.C. § 12182(b)(1)(A)(i) (emphasis added).

In order to realize its purpose, the ADA prohibits a covered entity from discriminating against a qualified individual with a disability "because of the disability of such individual." 42 U.S.C. § 12112(a). On its face, that provision prohibits a covered entity from taking disability "into account" in granting or denying disability benefits. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-45

(1989) (reasoning that "because of" language in Title VII prohibits an employer from taking race or gender "into account"). However, that is precisely what the long-term disability benefits plan does in this case – it makes a disability benefits decision (*i.e.*, the amount of long-term disability benefits) after taking different disabilities (mental and physical) "into account." By treating mentally disabled individuals less favorably than those with physical disabilities for insurance coverage purposes, and by arbitrarily drawing a distinction between these two groups that restricts long-term disability coverage for the mentally disabled as compared with the full benefits offered to physically disabled individuals under the same insurance plan, the Schering-sponsored, and MetLife-issued, insurance plan violated the ADA by discriminating against Ford **based solely upon her disability**. By holding that such long-term disability-based distinctions do not violate the ADA, the Third Circuit ignored this statutory scheme and misapplied the statute.

When drafting the ADA, Congress was apparently aware that many health insurance plans provide different levels of coverage for treating mental conditions. In fact, it believed that it would be "permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, *e.g.*, only a specified amount per year for mental health coverage." S. Rep. No. 116, 101st Cong., 1st Sess. at 29. This same Report made clear, however, that Congress disapproved of any covered entity singling out those with mental conditions for less coverage on subjects unrelated to treating the mental condition. *Id.* Therefore, if a covered entity cannot single out individuals with mental conditions for lesser treatment under a health plan for concerns unrelated to treating the mental condition, then it also should not be able to single out individuals with these conditions for

lesser benefits under the terms of a long-term disability insurance plan.

Although the Third Circuit perceived the issue in this case to be whether or not an insurance plan that differentiated between types of disabilities was equally available to all Schering employees, (*See* App., *infra*, 15a), this case actually involves "a specific disabled employee facing differential treatment due to her disability." (App., *infra*, *id.*). The court's conclusion that this plan was equally available to all Schering-Plough employees was rendered without consideration of the fact that qualified individuals with mental/nervous disabilities were prevented from receiving the **full** benefits afforded to individuals suffering from other disabilities. This result is analogous to the clearly insupportable proposition that an insurance plan which permits all races to **participate** is nondiscriminatory, even though one race is entitled to receive benefits for only two years, while another race receives benefits until age 65.

In arriving at its conclusion that the ADA permits disability-based distinctions in long-term benefits, the Third Circuit relied upon cases decided under the Rehabilitation Act such as *Traynor v. Turnage*, 485 U.S. 535 (1988) and *Alexander v. Choate*, 469 U.S. 287 (1985). In *Traynor*, this Court held that the specific benefit distinction at issue in that case did not violate the Rehabilitation Act. 485 U.S. at 550. The **Traynor** Court did, however, suggest that it would be impermissible for an entity to "distinguish between categories of disabled [individuals] accord[ing] to generalized determinations that lack any substantial basis." *Id.*

The Third Circuit's application of the more limited content of the Rehabilitation Act to the broader social mandate and comprehensive scheme of the ADA in this case was

in error. Although the ADA draws upon Rehabilitation Act standards, there are substantive distinctions between the two which warrant an interpretation of the ADA that is consistent with its legislative intent, and not a distinct statute such as the Rehabilitation Act. The Rehabilitation Act, for example, imposes restrictions on the disbursement of benefits under government programs. Consequently, that Act is primarily concerned with assuring that "handicapped" individuals receive "evenhanded treatment" in relation to "nonhandicapped" individuals. *See Alexander v. Choate*, 469 U.S. 287, 304 (1985).

In contrast, the ADA specifically prohibits discrimination based on disability, making it illegal for a covered entity to discriminate against a qualified individual, or class of individuals, with a disability "because of the disability of such individual." 42 U.S.C. § 12112(a). This language does not derive from the Rehabilitation Act, but Title VII. *See* 42 U.S.C. § 2000e-2(a)(1). The court below, as well as the Sixth Circuit's *en banc* majority in *Parker*, relied upon the Rehabilitation Act in construing the remedial, and broader, ADA provisions. In fact, this Court recently concluded in an ADA case that it was required under the statute "to construe the ADA to grant **at least as much protection** as provided by the regulations implementing the Rehabilitation Act." *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998) (emphasis added). This Court should grant the writ sought by Petitioner to correct the errors of these circuit courts, and to clarify the substantive distinctions between the ADA and Rehabilitation Act.

In addition to applying Rehabilitation Act standards to this ADA case, the court below also relied upon two cases from sister circuits in holding that disparate benefit limitations are permissible, *Krauel v. Iowa Methodist Med. Ctr.*, 95

F.3d 674 (8th Cir. 1996), and *EEOC v. CNA Ins. Co.*, 96 F.3d 1039 (7th Cir. 1996). Neither of these cases address this issue, however.

Krauel held that an employer did not violate Title I of the ADA where its health insurance plan did not pay for infertility treatment. The Eighth Circuit affirmed the District Court's holding that infertility was not an ADA-covered disability. Therefore, the distinction was not disability-based because it applied both to individuals with and without disabilities. *Krauel*, 95 F.3d at 677. Conversely, in the case at bar, plaintiff's claim is based upon a disability clearly covered by the ADA. *See* 42 U.S.C. § 12102(2). She was the subject of a discriminatory distinction in her insurance benefits **solely** because of her protected mental disability. Thus, the *Krauel* analysis is inapposite.

CNA is similarly inapplicable to the instant matter in that the Seventh Circuit's analysis relies upon the now discredited Fourth Circuit and Western District of Tennessee opinions in *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995)(en banc), and *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. 1321 (W.D. Tenn. 1995). The Seventh Circuit's *CNA* analysis, and decision that a current "employment position" was a prerequisite to have standing under the ADA, also predates this Court's decision in *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997), and the Third Circuit's decision in this case that a current "employment position" is not a requirement to assert standing under the ADA. *CNA* is therefore of questionable, if any, authoritative value to an analysis of the disparate benefits issue.

This Court should therefore exercise its supervisory authority and grant this petition in order to correct the erroneous Third (and Sixth) Circuit conclusion that a disability-

based disparity in insurance benefits does not violate the ADA.

III. The Third Circuit's Decision That Title V of the ADA Does Not Require a Disability Insurer to Justify its Disability-Based Distinction in Insurance Benefits With Competent Evidence Contravenes the Legislative History, and Interpretive Case Law, Underlying the ADA Which Expressly Require This Evidential Support.

The Third Circuit took the remarkable position that the ADA "does not 'specifically relate[] to the business of insurance'". (App., *infra*, 24a). This conclusion not only contradicts the express language of § 12201 of the ADA, but renders superfluous Title V of that statute.

Title V of the ADA ensures that, just as with any other "fringe benefit" or provision of "services," so too must an insurance "benefit" comply with the ADA. The wealth of emerging considered authority on point recognizes that Title V mandates a judgment in favor of Petitioner, unless the Respondents can show that facially discriminatory provisions, as here, fall within the narrow "safe harbor" articulated in the statute.

Section 12201(c) of Title V, known as the "safe harbor" provision, states that insurance distinctions based upon legitimate underwriting risks, not inconsistent with state law, are not prohibited. This provision was intended to emphasize that "insurers may continue to sell to and underwrite individuals applying for life, health or other insurance on an individually underwritten basis, or to service such insurance products, so long as the standards used are based on sound

actuarial data and not on speculations". *Kotev v. First Colony Life Insurance Company*, 927 F.Supp. 1316 (C.D. Cal. 1996) (*citing* Judiciary Report at 137, Senate Report at 85; Education and Labor Report at 137, Preamble to Regulations on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. Part 36, App. B. at 612). However, this Title also goes on to state that the "safe harbor" provision "shall not be used as a subterfuge to evade the purposes of subchapter[s] I and III of this Chapter." 42 U.S.C. § 12201(c).

Thus, by affording Respondents with some legitimate defenses to an ADA claim, Title V makes it abundantly clear that insurance plans are subject to the ADA and that, absent competent evidence supporting any disability-based distinctions, any such distinctions made in benefit plans will violate the ADA. This conclusion is supported by both the ADA's legislative history, and cases that have applied and interpreted it. For instance, in *Kotev* the court conducted a thorough review of the ADA's legislative history, regulations and comments and concluded that a plaintiff is entitled to bring a claim under Title III for the discriminatory denial of insurance coverage. The *Kotev* Court explained as follows:

> The regulations implementing Title III also demonstrate that Title III governs the issuance of insurance policies. 12 C.F.R. § 36.212 provides a safe harbor to insurers, similar to 42 U.S.C. § 12201(c), who "underwrite[e] risks, classify[ ] risks, or administer[ ] such risks that are based on or not inconsistent with state law." The preamble to the Title III regulations emphasizes that insurance companies are public accommodations and that the practices of the insurance industry are covered by

Title III. With regard to § 36.212, the preamble states:

> Language in the committee reports indicates that Congress intended to reach insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified. **"Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.** (Senate Report at 84; Education and Labor report at 136), Section 501(c) of the Act was intended to emphasize that "insurers may continue to sell to and underwrite individuals applying for life, health or other insurance on an individually underwritten basis, or to service such insurance products, so long as the standards used are based on sound actuarial data and not on speculation" (Judiciary report at 70 (emphasis added); see also Senate report at 85; Education and Labor report at 137). Preamble to Regulation on Nondiscrimination on Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. Part 36, App. B at 612.

> The Department of Justice further notes that "life and health insurance are the areas where the regulation will have its greatest application." *Id.* at 613. This commentary is consistent with the legislative history of 42 U.S.C.§ 12201(c) which states: **"In sum, ADA requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonable anticipated experience."** H.R.Rep. No. 485, 101st Cong., 2d Sess. at 71; S.Rep.No. 116, 101st Cong., 1st Sess. at 84-86. **The legislative history and the regulations and comments of the Justice Department support the Court's conclusion that Kotev is entitled to bring a claim under Title III for the discriminatory denial of insurance coverage.**

927 F. Supp. at 1323. [Emphasis Added].

Moreover, the *Kotev* court considered the "safe harbor" provision to impose a **duty** upon defendants to **justify** their insurance plan decisions on an actuarial or underwriting basis, to show that they comply with "state law", and to show that they are not a "subterfuge" for prohibited disability discrimination. As *Kotev* explained, the plain language of 501(c) itself cannot be read to exempt insurance companies from the prohibitions of the ADA, because that language provides that it "shall not be used **as a subterfuge** to evade the purposes of subchapter[s] I and III of this chapter." 42 U.S.C. § 12201(c) (emphasis added). A number of other courts have followed the sensibility of this supported logic: *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1168-69 (E.D. Va. 1997) (concluding that an insurer may not draw a distinction between mental and psychical disabilities absent

compliance with actuarial principles or other competent factual basis); *World Ins. Co. v. Branch*, 966 F. Supp. 1203, 1208 (N.D. Ga. 1997) (granting insured's counterclaim under the ADA to extend this principle to plan distinctions targeting particular disabilities); *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299, 305-06 (N.D. Cal. 1997) (holding that "the evidence suggest[ed] that Prudential did not base its decision on sound actuarial data," and that the denial of plaintiff's application "may not have accorded with reasonably anticipated experience"); *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 778 (E.D. Tex. 1996) ("The ADA puts the burden on those actors classifying risks to show both their rationality and permissibility"); *Doukas v. Metropolitan Life Insurance Co.*, 950 F. Supp. 422 (D.N.H. 1996) (summary judgment on Title III claim denied due to lack of actuarial basis for insurer's denial of coverage for bipolar disorder); *Piquard v. City of East Peoria*, 887 F. Supp. 1106, 1125 (C.D. Ill. 1995) ("The EEOC's Interim Policy . . . explains that requiring the defendant to bear the burden of proof is consistent with the principle that the burden of proof should rest with the party who has the greatest access to the relevant facts); and *Baker v. Hartford Life Ins. Co.*, 1995 WL 573430, at *3-4 (N.D. Ill. 1995) (holding that the rule of construction contained in Section 12201(c)(1) of Title V placed the burden upon defendant to show that its decision to deny plaintiff coverage was: (1) based on considerations of underwriting or classifying risks; and (2) not a subterfuge for disability discrimination).

As the Court aptly noted in *Piquard v. City of East Peoria*, 887 F. Supp. 1106 (C.D. Ill. 1995), such blanket assumptions about particular disabilities are not legally justifiable without competent evidence:

Section 3 of the NAIC's [National Association of Insurance Commissioners] Model Regulation on Unfair Discrimination in Life and Health Insurance on the Basis of Physical or Mental Impairment prohibits:

> [R]efusing to insure, or refusing to continue to insure, or limiting the amount, extent or kind of coverage available to an individual, or charging a different rate for the same coverage **solely because of physical or mental impairment, except where the refusal, limitation or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.** (Emphasis Added)

* * *

The House and Senate Reports further state that:

> [W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage **solely because of a physical or mental impairment,** except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

Id. at 1110.

Despite this evidentiary requirement of Title V, the Third Circuit concluded that an insurer is never required "to justify its policy coverage after a plaintiff's mere **prima facie** allegation" of discrimination between disabilities. (App., *infra*, 23a-24a). However, Petitioner did not "merely allege" discrimination; the disability plan at issue here discriminated, **on its face**, among disabilities. Respondents could have, but did not, attempt to show on their 12(b)(6) motion that such discrimination was justified by actuarial data, rather than the very stereotypes about mental disabilities which the ADA was designed to eradicate. Petitioner asked merely for the opportunity to require defendants to do so on remand, as the ADA and the cases interpreting it require.

In holding that insurers are **never** subject to the ADA unless they deliberately violate it, the Third Circuit relied upon this Court's construction of the "subterfuge" provision in *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989). (App., *infra*, 22a-24a). *Betts* analyzed provisions in a state retirement plan that was challenged as a discriminatory subterfuge pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 ("ADEA"). In its analysis, the Court defined subterfuge under the ADEA to require a "scheme, plan, stratagem, or artifice of evasion" used to discriminate "in some **non-fringe benefit** aspect of the employment relationship." *Betts*, 492 U.S. at 181 (emphasis added). The *Betts* Court ultimately held that the scrutinized provisions did not constitute an ADEA subterfuge **solely** because the retirement plan was enacted prior to the enactment of the ADEA. *Id.* at 167.

In contrast, the ADA expressly provides that an employer may not discriminate with respect to the "fringe

benefits" of employment, including contracting with an organization providing such benefits in a discriminatory manner. 42 U.S.C. § 12112(b)(2). On this basis, the EEOC's Interim Guidance specifically provides that the *Betts* rationale **does not apply** to Title I cases because, unlike the ADEA, Title I prohibits such "fringe benefit" discrimination. EEOC Interim Guidance, Daily Lab. Rep. (BNA) No. 109 at E-2. Moreover, the burden of proving that a plan is not a subterfuge is on defendants. *Id.* at E-3. The EEOC's reasonable interpretation of the "subterfuge" issue as it relates to the ADA is entitled to deference, as this Court has previously concluded that "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).

Of significance is the further issue that the long-term disabilities plan adopted by MetLife prior to the ADA's enactment, which made a disability-based distinction adversely affecting mentally disabled individuals, has not been brought into compliance with the ADA. Judge Alito raised this issue in a footnote to his concurrence below as follows:

> Three justices in *[United Air Lines, Inc v.]McMann* rejected the majority's conclusion that a plan adopted prior to the enactment of the ADEA could not be a subterfuge to avoid the purposes of that Act. *See* 434 U.S. at 204-05 (White, J., concurring); *id.* at 219 n.13 (Marshall, J., joined by Brennan, J., dissenting). According to these justices, a pre-Act plan could become a subterfuge if it was maintained after the passage of the ADEA in order to evade the purposes of that Act. One could argue that this position is stronger under the

> ADA's "safe harbor" provision due to difference [sic] in the statutory language. *Compare* 29 U.S.C. § 623(f) ("*is not* a subterfuge to evade the purposes of" the ADEA) (emphasis added) *with* 42 U.S.C. § 1201(c) [sic] ("*shall not be used* as a subterfuge to evade the purposes of" the ADA)(emphasis added). However, I do not believe that this change is sufficient to avoid the mandate of *McMann* and *Betts*.

(App., *infra*, 35a-36a). The import of Judge Alito's observation on this issue should not be overlooked, and, by virtue of this Court's supervisory authority, Ford's petition should be granted in order to clarify that a "subterfuge" under the ADA is not that which was addressed in *Betts*, and that all insurance plans, whether effective before or after the ADA, must nevertheless comply with that Act.

Conclusion

Petitioner respectfully requests that this Court grant her petition for a Writ of Certiorari.

Respectfully Submitted,

Brian J. Molloy
Counsel of Record
Maureen S. Binetti
Christopher W. Hager
WILENTZ GOLDMAN &
SPITZER, P.A.
90 Woodbridge Center Drive,
Suite 900
Box 10
Woodbridge, NJ 07095-0958
Attorneys for Petitioner

Dated: September 28, 1998

(Footnotes Trail Opinion)
Filed May 22, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5674

COLLEEN V. FORD,
Appellant

v.

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 96-cv-01991)

Argued January 28, 1998

BEFORE: MANSMANN, COWEN and ALITO, Circuit Judges

(Filed May 22, 1998)

Maureen S. Binetti, Esq. (Argued)
Wilentz, Goldman & Spitzer
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, NJ 07095

Counsel for Appellant

Colleen V. Ford
Robert J. Gregory, Esq.
(Argued)
Room 7032
Equal Employment Opportunity
Commission
1801 L Street, N.W.
Washington, DC 20507

Counsel for Amicus-Appellant
Equal Employment Opportunity
Commission

Corrie L. Fischel, Esq.
McGuiness & Williams
1015 15th Street, N.W.
Suite 1200
Washington, DC 20005

Counsel for Amicus-Appellee
Equal Employment Advisory
Council

Patricia A. Dunn, Esq.
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Suite 700
Washington, DC 20005-2088

Counsel for Amicus-Appellee
American Council Life Insurance

Ronald S. Cooper, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.

Washington, DC 20036
Counsel for Amicus-Appellee
Association of Private Pension
And Welfare Plans
Blue Cross and Blue Shield
Association

Thomas F. Campion, Esq. (Argued)
Lee E. Miller
Shanley & Fisher
131 Madison Avenue
Morristown, NJ 07962-1979

Counsel for Appellee
Schering Plough Corporation

Allen I. Fagin
Aaron J. Schindel
Ronald S. Rauchberg
Proskauer, Rose, Goetz &
Mendelsohn
1585 Broadway
New York, NY 10036

Allan M. Marcus, Esq. (Argued)
Metropolitan Life Insurance
Company
Law Department
One Madison Avenue
New York, NY 10010-3690

Sondra M. Hirsch, Esq.
Metropolitan Life Insurance
Company
One Meadowlands Plaza

1st Floor
East Rutherford, NJ 07073

Counsel for Appellee
Metropolitan Life Insurance
Company

OPINION OF THE COURT

COWEN, Circuit Judge.

This appeal presents the purely legal question of whether a disparity between disability benefits for mental and physical disabilities violates the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. (1994). The plaintiff-appellant, Colleen Ford, sued her employer, Schering-Plough Corporation (Schering), and the carrier of Schering's group insurance policy, Metropolitan Life Insurance Company (MetLife), alleging that the two-year cap applicable to benefits for mental disabilities, but not for physical disabilities, violates the ADA. On September 12, 1996, the District Court for the District of New Jersey granted the defendants' motion to dismiss Ford's complaint under Federal Rule of Civil Procedure 12(b)(6). Ford appealed. We will affirm the order of the district court dismissing Ford's complaint even though we differ with the district court by finding Ford eligible to file suit under Title I of the ADA.

I.

The facts concerning the plaintiff's employment and her disability are not in dispute. Ford was an employee of Schering from 1975 until May of 1992, when she became disabled by virtue of a mental disorder and was unable to

continue her employment. While she served as an employee, Ford enrolled in the employee welfare benefits plan offered by Schering through MetLife. The plan provided that benefits for physical disabilities would continue until the disabled employee reached age sixty-five so long as the physical disability persisted. Regarding mental disabilities, however, the plan mandated that benefits cease after two years if the disabled employee was not hospitalized. Ford found herself in this latter category, suffering from a mental disorder yet not hospitalized and thus ineligible for a continuation of her benefits past the two-year limit. Her benefits expired on Nov. 23, 1994.

Ford filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The EEOC issued her a "right-to-sue" letter on January 31, 1996. Subsequently, Ford filed a three-count complaint against Schering and MetLife alleging discrimination in violation of the ADA. The defendants filed motions to dismiss the complaint pursuant to Rule 12(b)(6) and, in the alternative, for summary judgment. The district court granted the defendants' Rule 12(b)(6) motion, dismissing the complaint for failure to state a claim. This appeal followed.

II.

We have jurisdiction under 28 U.S.C. § 1291 (1994), and our review over the district court's order is plenary. When considering a Rule 12(b)(6) motion, we accept as true all the allegations set forth in the complaint, and we must draw all reasonable inferences in the plaintiff's favor. See Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991). Dismissal of a plaintiff's claim under Rule 12(b)(6) occurs only if the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355

U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

III.

Because the facts of this case are not in dispute, our analysis focuses on the legal question of whether the disparity between mental and physical disability benefits violates the ADA and, as a preliminary issue, whether Ford is even eligible to sue under the ADA. We will address Ford's claims under Titles I and III seriatim.

A.

Ford's first claim alleges that the defendants' group insurance plan violates Title I of the ADA because of the disparity in benefits between mental and physical disabilities. Title I of the ADA proscribes discrimination in the terms and conditions of employment and mandates in relevant part:

> (a) General rule
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (b) Construction
>
> As used in subsection (a) of this section, the term "discriminate" includes--
>
> . . . .

> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with . . . an organization providing fringe benefits to an employee of the covered entity[)] . . . .

42 U.S.C. § 12112(a)-(b) (emphasis added). As the plaintiff correctly observes, the defendants' group insurance plan is a fringe benefit of employment at Schering. Ford claims that the defendants violated Title I of the ADA because the mental-physical disparity constitutes discrimination against her on the basis of her disability.

i.

Before addressing the merits of Ford's Title I claim, we must first ascertain whether Ford is eligible tofile suit under Title I. While the district court held that Ford lacked "standing[,]" Dist. Ct. Op. at 7, the question of standing is not at issue in this case. Indeed, Ford has been"injured in fact" by the denial of her benefits, which is"an injury to [herself] that is likely to be redressed by a favorable decision." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 96 S. Ct. 1917, 1924 (1976). Furthermore, Ford's interest is arguably within the zone of interests regulated by the ADA. See id. at 39 n.19, 96 S. Ct. at 1925 n.19. Instead of ascertaining Ford's standing, we must assess Ford's eligibility under the ADA's requirements to file suit.

Title I of the ADA restricts the ability to sue under its provisions to a "qualified individual with a disability[,]"

whose characteristics are defined as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8). Thus, an individual eligible to sue under Title I of the ADA must be disabled but still able to perform his or her job duties with or without a reasonable accommodation by the employer. Ford, however, admits that she is currently unable to work even with a reasonable accommodation. Indeed, her disabled status is the reason for her desire to receive the disability benefits at issue here.

The defendants-appellees argue that Ford is clearly ineligible to sue under Title I of the ADA because she is currently disabled, and they point to our recent statement that "a person unable to work is not intended to be, and is not, covered by the ADA." McNemar v. Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 958 (1997). McNemar focused on whether an individual is judicially estopped from claiming to be a "qualified individual with a disability" when he represented to governmental agencies that he was completely disabled. In McNemar, an HIV-positive man represented to government agencies that he was completely disabled for the purpose of receiving disability benefits. At the same

time, he asserted that he was a "qualified individual with a disability[,]" meaning that he could work with or without a reasonable accommodation, in his suit against his former employer under the ADA for wrongful discharge. As a result, we concluded that the district court was within its discretion in finding that McNemar's representations to government agencies estopped him from claiming that he was a "qualified individual with a disability" under Title I. See id. at 617-18.

At first glance, McNemar seems to cover the instant case since Ford has asserted she is completely disabled for purposes of disability benefits yet is now asserting she is a "qualified individual with a disability" for purposes of her ADA suit. However, despite its apparent relevance, McNemar is distinguishable. In McNemar, the plaintiff's situation vis-a-vis the ADA did not give rise to the possibility that, for reasons intrinsic to the ADA, there was an ambiguity in the definition of "qualified individual with a disability[.]" The essence of McNemar's suit was that he could still work despite his disability (meaning that he was wrongfully discharged), yet he simultaneously received benefits for being unable to work due to his disability. McNemar's situation did not unearth an internal contradiction in the ADA; instead, the contradiction in McNemar's position arose between McNemar's various representations, namely his claim of wrongful discharge and his assertion to government agencies that he was completely disabled.

In the instant case, Ford is also attempting to qualify under Title I's eligibility requirement, but the factual predicate of her claim (that she is disabled and deserving of disability benefits) matches the representation she made to qualify for the benefits she already received. Unlike the

McNemar plaintiff, Ford illuminates an internal contradiction in the ADA itself, namely the disjunction between the ADA's definition of "qualified individual with a disability" and the rights that the ADA confers. Title I of the ADA prohibits discrimination by employers regarding the "terms, conditions, and privileges" of employment, 42 U.S.C. § 12112(a), including "fringe benefits" such as disability benefits. Id. § 12112(b)(2). Yet, as Ford and the EEOC as amicus argue, restricting eligibility to sue under Title I to individuals who can currently work with or without a reasonable accommodation prevents disabled former employees from suing regarding discrimination in disability benefits. Once an individual becomes disabled and thus eligible for disability benefits, that individual loses the ability to sue under a strict reading of Title I's definition of "qualified individual with a disability" because that individual can no longer work with or without a reasonable accommodation. In order for the rights guaranteed by Title I to be fully effectuated, the definition of "qualified individual with a disability" would have to permit suits under Title I by more than just individuals who are currently able to work with or without reasonable accommodations.

This disjunction between the explicit rights created by Title I of the ADA and the ostensible eligibility standards for filing suit under Title I causes us to view the contents of those requirements as ambiguous rather than as having an unassailable plain meaning. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., ___ U.S. ___, ___, 117 S. Ct. 843, 846 (1997) (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477, 112 S. Ct. 2589, 2594-95 (1992), and

McCarthy v. Bronson, 500 U.S. 136, 139, 111 S. Ct. 1737, 1740 (1991)). The locus of the ambiguity is whether the ADA contains a temporal qualifier of the term "qualified individual with a disability[.]" If the putative plaintiff must, at the time of the suit, be employable with or without a reasonable accommodation, then a disabled former employee loses his ability to sue to challenge discriminatory disability benefits. Alternatively, the term "qualified individual with a disability" may include former employees who were once employed with or without reasonable accommodations yet who, at the time of suit, are completely disabled.

The Supreme Court's recent decision in Robinson, which concerned the scope of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994), contributes to this ambiguity by lending support for interpreting Title I of the ADA to permit suits by disabled individuals against their former employers concerning their disability benefits. Cases interpreting Title VII are relevant to our analysis of the ADA because the ADA is essentially a sibling statute of Title VII. Indeed, the ADA's accompanying House report states that the purpose of the ADA is "to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women." H.R. Rep. No. 101-485, pt. 3, at 48 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 471. Furthermore, the ADA incorporates by reference several terms defined in Title VII. See 42 U.S.C. § 12111(7) (incorporating Title VII's definitions of "person", "labor organization", etc.).

In Robinson, the Supreme Court analyzed whether former employees are allowed to bring suits against their previous employers under Title VII for post-termination retaliation such as negative job references. The Court found that the

term "employees" as used in § 704(a) of Title VII was ambiguous regarding its temporal reach, i.e., whether it covered only current employees or encompassed former employees as well. See ___ U.S. at ___, 117 S. Ct. at 846-48. Resolving this ambiguity, the Court held that the term encompassed former employees in order to provide former employees with a legal recourse against post-termination retaliation. See id. at ___, 117 S. Ct. at 848-49; see also Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir. 1994) (former employee may file a retaliation claim against a former employer under Title VII).

As with the term "employees" in Title VII, the ADA contains an ambiguity concerning the definition of "qualified individual with a disability" because there is no temporal qualifier for that definition. Congress could have restricted the eligibility for plaintiffs under the ADA to current employees or could have explicitly broadened the eligibility to include former employees. Since Congress did neither but still created rights regarding disability benefits, we are left with an ambiguity in the text of the statute regarding eligibility to sue under Title I.

We resolve this ambiguity by interpreting Title I of the ADA to allow disabled former employees to sue their former employers regarding their disability benefits so as to effectuate the full panoply of rights guaranteed by the ADA. This is in keeping with the ADA's rationale, namely "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [and] to provide clear, strong, consistent, enforceable standards addressing [such] discrimination . . . ." 42 U.S.C.§ 12101(b)(1)-(2) (emphasis added). Our decision is also in keeping with the Supreme Court's Robinson decision, which found that the temporal reach of

Title VII encompasses former employees, and our pre-Robinson decision to that effect in Charlton, 25 F.3d at 200.

By adopting this interpretation, we part ways with the Seventh and Eleventh Circuits, both of which tendered decisions prior to Robinson.1 In EEOC v. CNA Ins. Companies, 96 F.3d 1039 (7th Cir. 1996), the Seventh Circuit rejected the suit of an individual in a position similar to Ford's. Litigating on behalf of the former employee, the EEOC argued that the individual was eligible to sue under Title I by arguing that an analogy may be drawn to decisions allowing former employees to sue employers for retaliation under Title VII. The Seventh Circuit rejected this argument by noting that no discrimination against the plaintiff occurred during her employment, while, in the Title VII retaliation situation, actual harm occurred by virtue of the retaliation. As the Seventh Circuit wrote, "[N]othing happened that discriminated against her during the time she was working at CNA. The only thing that occurred was CNA's 1985 decision to reduce the long-term benefits available to all of its employees for mental health problems." Id. at 1045. However, the Seventh Circuit's brief analysis conflates two issues, the first being whether the individual could sue regarding fringe benefits while completely disabled, and the second being whether the individual's suit had merit and was based upon actual discrimination. The Seventh Circuit essentially declined to find the individual eligible to sue because her suit lacked merit. Therefore, we do notfind the Seventh Circuit's reasoning persuasive regarding whether Ford is eligible to sue in the instant case as opposed to whether her suit has merit.2

We also disagree with the Eleventh Circuit's ruling in Gonzales v. Garner Food Services, Inc., 89 F.3d 1523 (11th Cir. 1996). In Gonzales, as in the instant case, a disabled former employee sued his former employer under the ADA regarding alleged discrimination in disability benefits. The Eleventh Circuit recognized the possible analogy between the Title VII retaliation context and the ADA situation, but it refused to adopt this analogy and to grant the plaintiff permission to sue. Instead, the Eleventh Circuit argued that, "[a]bsent clearly expressed legislative intent to the contrary, the plain language of the statute should be conclusive." Id. at 1528. The Eleventh Circuit concentrated on what it believed to be the plain meaning of the ADA, that only currently employable individuals could sue. However, it failed to address the possibility that the disparity between the rights created by the ADA and the apparent legal remedy fashioned by the ADA creates an ambiguity in the eligibility requirements for obtaining a remedy.

In sum, we respectfully disagree with the district court and sister courts of appeals. We find that Title I of the ADA does permit disabled individuals to sue their former employers regarding their disability benefits. We reach this conclusion because the ADA's proscription of discrimination in fringe benefits generates the need for disabled individuals to have legal recourse against such discrimination and exposes the temporal ambiguity in the ADA's definition of "qualified individual with a disability[.]" We resolve this ambiguity in favor of a broad temporal interpretation of "qualified individual with a disability[,]" that disabled former employees, no longer able to work with or without reasonable accommodations, can sue their former employers concerning alleged discrimination in their package of disability benefits. Our impetus for this conclusion also comes from the Supreme Court's Robinson

decision allowing former employees to sue under Title VII of the Civil Rights Act of 1964.

ii.

Having established Ford's eligibility to sue under Title I, we must now ascertain whether she states a claim that survives the defendants' Rule 12(b)(6) motion. Ford essentially claims that the disparity between benefits for mental and physical disabilities violates Title I of the ADA. However, Ford's argument does not support a finding of discrimination under Title I.

While the defendants' insurance plan differentiated between types of disabilities, this is a far cry from a specific disabled employee facing differential treatment due to her disability. Every Schering employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every Schering employee received equal treatment. So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities. The ADA does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA.

This analysis is supported by Supreme Court and Third Circuit precedent concerning the Rehabilitation Act of 1973, 29 U.S.C.§ 794 (1994), to which we may look for guidance in interpreting the ADA. See Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998). In Alexander v. Choate, 469 U.S. 287, 105 S. Ct. 712 (1985), plaintiffs sued in response to the Tennessee Medicaid

program's reduction in the number of inpatient hospital days for which it would pay. The plaintiffs claimed that the reduction would have a disproportionate effect on handicapped individuals since they would require longer inpatient care than non-handicapped individuals. However, the Supreme Court held that the limit on inpatient hospital care was "neutral on its face[ ]" and did not "distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having." Id. at 302, 105 S. Ct. at 720-21. According to the Supreme Court, handicapped citizens did not suffer from discrimination because both handicapped and non-handicapped individuals were "subject to the same durational limitation." Id. at 302, 105 S. Ct. at 721.

Building on Alexander, the Supreme Court in Traynor v. Turnage, 485 U.S. 535, 108 S. Ct. 1372 (1988), dismissed a challenge to a federal statute precluding the Veterans Administration from granting extensions to a ten-year delimiting period for veterans to claim their benefits if the veterans' disabilities arose from their own willful misconduct, defined by regulations as including alcoholism. The Supreme Court rejected the argument that the statute discriminated against one type of disability, namely alcoholism. "There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." Id. at 549, 108 S. Ct. at 1382.

We have likewise held, in the context of the Rehabilitation Act, that a state's medical assistance statute need not treat every disability equally. In Doe v. Colautti,

592 F.2d 704 (3d Cir. 1979), we dismissed a challenge to a Pennsylvania statute that provided unlimited hospitalization for physical illness in a private hospital but restricted hospitalization for mental illness in private mental hospitals. We rejected the argument that the differential level of benefits violated the Rehabilitation Act by noting that, "[i]n the treatment of their physical illnesses, the mentally ill receive the same benefits as everyone else. A mental patient with heart disease, for instance, is as entitled to benefits for treatment of the heart disease as would be a person not mentally ill." Id. at 708. Our holding in Doe is supported by the D.C. Circuit's decision in Modderno v. King, 82 F.3d 1059 (D.C. Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 772 (1997), in which the D.C. Circuit rejected a challenge brought by a former spouse of a foreign service officer against the Foreign Service Benefit Plan under the Rehabilitation Act based upon the plan's lower level of benefits for mental illness as compared to physical illness.

Aside from Supreme Court and Third Circuit precedent in the Rehabilitation Act context, claims under the ADA similar to Ford's have been rejected by three courts of appeals in published opinions. While we disagree with the Seventh Circuit's reasoning in CNA regarding the plaintiff's eligibility to sue, we agree with its discussion regarding the merits of the plaintiff's claim. In rejecting the plaintiff's challenge to the disparity between benefits for mental and physical illnesses, the Seventh Circuit stated:

> One of those terms, conditions, or privileges of employment may be a pension plan, but there is no claim here that CNA discriminated on the basis of disability in offering its pension plan to anyone. It did not charge higher prices to disabled people, on the

> theory that they might require more in benefits. Nor did it vary the terms of its plan depending on whether or not the employee was disabled. All employees--the perfectly healthy, the physically disabled, and the mentally disabled--had a plan that promised them long-term benefits from the onset of disability until age 65 if their problem was physical, and long-term benefits for two years if the problem was mental or nervous. . . .
>
> [The plaintiff] raises a different kind of discrimination claim, more grist for the ERISA mill or the national health care debate than for the ADA. She claims that the plan discriminates against employees who in the future will become disabled due to mental conditions rather than physical conditions; their present dollars (unbeknownst to them) are buying only 24 months of benefits, instead of benefits lasting much longer. However this is dressed up, it is really a claim that benefit plans themselves may not treat mental health conditions less favorably than they treat physical health conditions. Without far stronger language in the ADA supporting this result, we are loath to read into it a rule that has been the subject of vigorous, sometimes contentious, national debate for the last several years. Few, if any, mental health advocates have thought that the result they would like to see has been there all along in the ADA.

CNA, 96 F.3d at 1044 (citations omitted). Likewise, in Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996), the Eighth Circuit rejected a challenge under the ADA to an insurance plan that denied coverage for infertility. Analogizing the infertility exclusion to differential benefits for mental and physical illnesses, the Eighth

Circuit stated, "Insurance distinctions that apply equally to all insured employees, that is, to individuals with disabilities and to those who are not disabled, do not discriminate on the basis of disability." Id. at 678. Finally, the Sixth Circuit in Parker rejected a claim similar to Ford's made against the same defendants as in the instant case. As the Sixth Circuit held, "Because all the employees at Schering-Plough, whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied." 121 F.3d at 1015-16; cf. Brennen v. Comptroller of the State of N.Y., 100 F.3d 942, 1996 WL 19057 (2d Cir. 1996) (unpublished table decision) (benefits extended to one category of disabled persons need not be extended to all other categories).

The cases finding no violation of the ADA by a disparity in benefits between mental and physical disabilities are supported by the ADA's legislative history. As the Senate Labor and Human Resources Committee report states:

> In addition, employers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for mental health coverage, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition. A limitation may be placed on reimbursements for a procedure or the types of drugs or procedures covered[,] e.g., a limit on the number of x-rays or non-coverage of experimental drugs or

> procedures; but, that limitation must apply to persons with or without disabilities. All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees.

S. Rep. No. 101-116, at 29 (1989).

In addition, legislative history subsequent to the ADA's passage evinces that Congress did not believe that the ADA mandated parity between mental and physical disability benefits. In 1996, the Senate defeated an amendment to the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified primarily in Titles 18, 26 and 42 of the U.S. Code), which would have mandated parity in insurance coverage for mental and physical illnesses. Such an amendment would have been unnecessary altogether if the ADA already required such parity. See 142 Cong. Rec. §9477-02 (daily ed. Aug. 2, 1996) (statement of Sen. Heflin); see also CNA, 96 F.3d at 1044. Furthermore, Congress then passed the Mental Health Parity Act of 1996, Pub. L. No. 104-204, Title VII, 110 Stat. 2944 (1996) (codified at 29 U.S.C.§ 1185a and 42 U.S.C. § 300gg-5), which mandates, inter alia, that a health insurance plan containing no annual or lifetime limit for medical benefits cannot have such limits on mental health. Such congressional action reveals both that the ADA does not contain parity requirements and that no parity requirements for mental and physical disability benefits have been enacted subsequent to the ADA.

iii.

Ford attempts to buttress her challenge to the disparity

between benefits for mental and physical disabilities by pointing to section 501(c) of the ADA, which contains the "safe harbor" provision covering the insurance industry. This section, codified at 42 U.S.C. § 12201(c), reads as follows:

> (c) Insurance
>
> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict --
>
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter [sic] I

and III of this chapter.

42 U.S.C. § 12201(c). Ford essentially claims that, once she presents a prima facie case alleging discrimination in disability benefits, Schering and MetLife must present actuarial data demonstrating that their plan is not a "subterfuge[.]" Hence, according to Ford, the district court erred in granting the defendants' Rule 12(b)(6) motion since the defendants had not offered data justifying the actuarial basis for the disparity in benefits.

Ford's argument must fail, however, since it runs contrary to Supreme Court precedent, ignores our statutory duty regarding insurance regulation and distorts the role of this court. First, Ford's argument that Schering and MetLife must justify their insurance plan contradicts the Supreme Court's interpretation of a provision similar to section 501(c) in the context of the Age Discrimination in Employment Act (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. § 621 et seq. (1994)). Prior to Congress's elimination of the term "subterfuge" from the ADEA in 1990, see Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978, the ADEA granted an exemption from the ADEA's prohibition of age discrimination to an employee benefit plan that was not "a subterfuge[.]" 29 U.S.C. § 623(f) (1988). In Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 109 S. Ct. 2854 (1989), the Supreme Court rejected a challenge to an insurance plan that rendered covered employees ineligible for disability retirement once they reached age sixty. Relying on its decision in United Air Lines, Inc. v. McMann, 434 U.S. 192, 98 S. Ct. 444 (1977), the Supreme Court concluded that the term "subterfuge" must be given its ordinary meaning of " `a scheme, plan, stratagem, or artifice

of evasion.' " Betts, 492 U.S. at 167, 109 S. Ct. at 2861 (quoting McMann, 434 U.S. at 203, 98 S. Ct. at 450). In addition, the Supreme Court found that requiring an insurance company to justify its coverage scheme had no basis in the statutory language. See id. at 170-71, 109 S. Ct. at 2863; see also McMann, 434 U.S. at 203, 98 S. Ct. at 450.

The Supreme Court's definition and analysis of the ADEA's use of the term "subterfuge" are applicable to the ADA's use of the term "subterfuge[.]" Congress enacted section 501(c) of the ADA in 1990, see Pub. L. No. 101-336, 104 Stat. 369 (1990), while the Supreme Court decided Betts in 1989. Congress therefore is presumed to have adopted the Supreme Court's interpretation of "subterfuge" in the ADEA context when Congress enacted the ADA. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 581, 98 S. Ct. 866, 870 (1978); see Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59, 31 S. Ct. 502, 515 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."). "Had Congress intended to reject the Betts interpretation of subterfuge when it enacted the ADA, it could have done so expressly by incorporating language for that purpose into the bill that Congress voted on and the President signed." Krauel, 95 F.3d at 679; accord Modderno, 82 F.3d at 1064. Accordingly, as the Supreme Court held in the ADEA context, the term "subterfuge" does not require an insurance company to justify its policy coverage after a

plaintiff's mere prima facie allegation.

The second reason that Ford's argument must fail is that it ignores our statutory duty under the McCarran-Ferguson Act regarding insurance cases. Pursuant to that Act, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012(b) (1994). The ADA does not "specifically relate[ ] to the business of insurance[,]" id., and does not mention the term "insurance" in its introductory section entitled "Findings and purpose[.]" See 42 U.S.C. § 12101. Accordingly, we will not construe section 501(c) to require a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff. This second reason is integrally related to the third reason Ford's argument regarding section 501(c) fails, namely that requiring insurers to justify their coverage plans elevates this court to the position of super-actuary. This court is clearly not equipped to become the watchdog of the insurance business, and it is unclear exactly what actuarial analysis the defendants would have to produce to disprove the charge of "subterfuge[.]" See Modderno, 82 F.3d at 1062-63 (noting confusion as to exactly what actuarial data would be sufficient).

B.

Ford's second claim against Schering and MetLife is that the disparity in benefits for mental and physical disabilities violates Title III of the ADA. Title III reads in relevant part as follows: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the

goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Relying on the principle that courts should avoid interpreting statutes in a manner rendering some words redundant, see United States v. Alaska, ___ U.S. ___, ___, 117 S. Ct. 1888, 1918 (1997), Ford and the U.S. Dept. of Justice as amicus essentially argue that the phrase "services, . . . privileges, [and] advantages" covers discrimination in realms different than physical access to facilities or else these words would be superfluous. Ford can also cite to the ADA itself for the proposition that an "insurance office[ ]" is a public accommodation under Title III. 42 U.S.C. § 12181(7)(F) (listing examples of public accommodations including "insurance office[]").

The fact that an insurance office is a public accommodation, however, does not mean that the insurance policies offered at that location are covered by Title III. In the instant case, Schering and MetLife offered disability benefits to Ford in the context of her employment at Schering, meaning that the disability benefits constituted part of the terms and conditions of Ford's employment. Terms and conditions of employment are covered under Title I, not Title III. "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." S. Rep. No. 101-116, at 58 (1989); see H.R. Rep. No. 101-485, pt. 2, at 99 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 382. Therefore, Ford cannot state a claim against her employer, Schering, pursuant to Title III. See Parker, 121 F.3d at 1015.

Regarding MetLife, the disability benefits that Ford challenges do not qualify as a public accommodation and thus do not fall within the rubric of Title III. The plain meaning of Title III is that a public accommodation is a place, leading to the conclusion that " `[i]t is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers[,] which fall within the scope of Title III.' " Id. at 1011 (quoting Stoutenborough v. National Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995) (a television broadcast is not covered by Title III)). This is in keeping with the host of examples of public accommodations provided by the ADA, all of which refer to places. See 42 U.S.C. § 12181(7).3 Since Ford received her disability benefits via her employment at Schering, she had no nexus to MetLife's "insurance office" and thus was not discriminated against in connection with a public accommodation. Furthermore, the "goods, services, facilities, privileges, advantages, or accommodations" concerning which a disabled person cannot suffer discrimination are not free-standing concepts but rather all refer to the statutory term "public accommodation" and thus to what these places of public accommodation provide. Ford cannot point to these terms as providing protection from discrimination unrelated to places.

Restricting "public accommodation" to places is in keeping with jurisprudence concerning Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994). Title II proscribes racial and religious discrimination in"the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . ." 42 U.S.C. § 2000a(a). This proscription has been limited to places rather than including membership in an organization, see Welsh v. Boy Scouts of Am., 993 F.2d

1267, 1269-75 (7th Cir. 1993), and rather than encompassing an organization's operations unconnected to any physical facility. See Clegg v. Cult Awareness Network, 18 F.3d 752, 755-56 (9th Cir. 1994).

Confining "public accommodation" to places is also in keeping with the Dept. of Justice's regulations to this effect:

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes.

28 C.F.R. pt. 36, app. B, at 640 (1997). Just as a bookstore must be accessible to the disabled but need not treat the disabled equally in terms of books the store stocks, likewise an insurance office must be physically accessible to the disabled but need not provide insurance that treats the disabled equally with the non-disabled. While the Dept. of Justice has issued other documents stating that Title III does cover the substance of insurance contracts, see Dept. of Justice, Title III Technical Assistance Manual: Covering Public Accommodations and Commercial Facilities § III-3.11000, at 19 (Nov. 1993) ("Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts

they offer."), such an interpretation is "manifestly contrary" to the plain meaning of Title III and, accordingly, is not binding on this court. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984); see Parker, 121 F.3d at 1012 n.5. Furthermore, since we find the plain meaning of "public accommodation" and 42 U.S.C. § 12182(a) to be clear, we have no need to analyze the ADA's legislative history.

We also note that, by aligning ourselves with the Sixth Circuit's Parker decision regarding the definition of "public accommodation[,]" we part company with the First Circuit in this regard. In Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994), the First Circuit held that Title III is not limited to physical structures. The First Circuit pointed to the inclusion of "travel service" in the list of public accommodations and noted:

> Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.

Id. at 19 (citing 42 U.S.C. § 12181(7)(F)). However, as the Sixth Circuit pointed out in Parker, 121 F.3d at 1014, the

First Circuit failed to read the examples of public accommodations that piqued the First Circuit's interest in the context of the other examples of public accommodations. The litany of terms, including "auditorium," "bakery," "laundromat," "museum," "park," "nursery," "food bank," and "gymnasium[ ]" refer to places with resources utilized by physical access. 42 U.S.C. § 12181(7)(D)-(F), (H)-(L). Pursuant to the doctrine of noscitur a sociis, the terms that the First Circuit finds ambiguous should be interpreted by reference to the accompanying words of the statute "to avoid the giving of unintended breadth to the Acts of Congress." Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307, 81 S. Ct. 1579, 1582 (1961). Accordingly, we do not find the term "public accommodation" or the terms in 42 U.S.C. § 12181(7) to refer to non-physical access or even to be ambiguous as to their meaning.

In sum, Ford fails to state a claim under Title III of the ADA since the provision of disability benefits by MetLife to Schering's employees does not qualify as a public accommodation.

IV.

For the above reasons, we will affirm the September 12, 1996, order of the district court dismissing Ford's complaint for failure to state a claim. Unlike the district court, we find that Ford is eligible to sue under Title I. However, Ford fails to state a claim under Titles I or III and errs in asserting that the "safe harbor" provision of Title V requires insurance companies to justify their coverage plans after a plaintiff's prima facie allegation.

Footnotes

1. The Sixth Circuit in Parker v. Metropolitan Life Ins. Co., 99 F.3d 181 (6th Cir. 1996), analyzed whether a plaintiff was eligible to sue under

Title I. However, that decision was vacated by the granting of the plaintiff's petition for rehearing en banc. See 6th Cir. R. 14(a). The en banc decision did not address the Title I issue because it was not raised by the plaintiff's petition for rehearing en banc. See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1009 n.2 (6th Cir. 1997) (en banc), cert. denied, ___ U.S. ___, 118 S. Ct. 871 (1998).

2. The EEOC also argued in CNA that the disabled person was in the "employment position" of "disability benefit recipient." Id. at 1043 (internal quotation marks omitted). According to the Seventh Circuit, the EEOC claimed that, "[b]ecause CNA imposes no job-related duties on any of the beneficiaries of its long-term disability plan, [the plaintiff] by definition can perform the essential functions of her position: there are none . . . ." Id. at 1043-44. The Seventh Circuit rejected that argument because, in its words, "[a]n `employment position' is a job[,]" id. at 1044, meaning that receiving disability benefits did not qualify as an employment position. However, Ford does not offer this argument in the instant litigation.

3. Section 12181(7) reads as follows:

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7).

ALITO, Circuit Judge, concurring in the judgment:

I agree with the majority that Ford fails to state a claim under the Americans with Disabilities Act (ADA). However, I reach this conclusion based solely on the insurance "safe harbor" provision located in section 501(c) of the ADA. See 42 U.S.C. § 12201(c).

Section 501(c) provides that Titles I and III of the ADA "shall not be construed to prohibit or restrict" the terms of a bona fide insurance plan. 42 U.S.C. § 12201(c). This exemption applies so long as it is not "used as a subterfuge to evade the purposes of" the ADA. Id. As the majority recognizes, the term "subterfuge" must be construed in accordance with the Supreme Court's decision in Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989). See Maj. Op. at 18-19. Betts concerned a "safe harbor" provision that exempted fringe benefit plans from coverage by the Age Discrimination in Employment Act (ADEA). See 29 U.S.C. § 623(f)(2) (1988).1 Like section 501(c), the ADEA exemption provided that it would not protect a plan that was "a subterfuge to evade the purposes of" the Act. Id. In interpreting this language, the Court concluded that an employee benefit plan adopted prior to the enactment of the ADEA could not be considered a subterfuge to evade the purposes of the ADEA. Betts, 492 U.S. at 166-69 (reaffirming the holding of United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977)). Under the same reasoning, the insurance plan challenged by Ford cannot be considered a subterfuge to evade the purposes of the ADA since the plan was adopted prior to the enactment of the ADA.2 See Modderno v. King, 82 F.3d 1059, 1063-1065 (D.C. Cir. 1996) (holding that an insurance plan enacted prior to the importation of ADA standards into the

Rehabilitation Act could not be considered a subterfuge to evade those standards). Accordingly, the defendants' plan is insulated from attack by section 501(c).

I further note that Ford's complaint as currently framed fails to allege that the defendants ever developed a"specific intent" to evade the purposes of the ADA. See Betts, 492 U.S. at 171. In Betts, the Court wrote:

> [W]hen an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation.

Betts, 492 U.S. at 181. Under this reading of "subterfuge," Ford could not successfully challenge the defendants' insurance plan unless she could show that it was intended to serve the purpose of discriminating in some non-insurance-benefit aspect of her relationship with the defendants. Ford's complaint contains no such allegation of intent.

Given the effect of section 501(c) on Ford's claims, I do not think that it is necessary for the court to conclude that distinguishing between people with different disabilities for insurance purposes is not discrimination based on disability. See Maj. Op. at 12-13. In fact, it would seem that making such distinctions does constitute discrimination in the most basic sense of the word. See Webster's Third New International Dictionary at 648 (defining discrimination as "the making or perceiving of a distinction or difference"). However, we need not wrestle with the question of what might or might not constitute unlawful insurance

discrimination under the ADA had Congress not addressed the issue; Congress did address the issue and provided an explicit answer in section 501(c).

In light of the ease with which Ford's claims can be resolved under section 501(c), I would not reach the more difficult issues of: 1) whether a former employee who can no longer work can meet Title I's "qualified individual with a disability" requirement; and 2) whether Title III's public accommodation provision guarantees anything more than physical access. These issues have divided the circuits, and I would reserve judgment until we are confronted with a case in which the unique considerations of insurance plans are not at stake.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Footnotes

1. Following Betts, section 623(f)(2) was amended by the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, S 103(1), 104 Stat. 978.

2. The disputed portions of the plan have been in effect since at least 1985. App. at 69, 87. The ADA was enacted in 1990. See 42 U.S.C. § 12101.

Three justices in McMann rejected the majority's conclusion that a plan adopted prior to the enactment of the ADEA could not be a subterfuge to avoid the purposes of that Act.

See 434 U.S. at 204-05 (White, J., concurring); id. at 219 n.13 (Marshall, J., joined by Brennan,

J., dissenting). According to these justices, a pre-Act plan could become a subterfuge if it was maintained after the passage of the ADEA in order to evade the purposes of that Act. One could argue that this position is stronger under the ADA's "safe harbor" provision due to difference in the statutory language. Compare 29 U.S.C. § 623(f) ("is not a subterfuge to evade the purposes of" the ADEA) (emphasis added) with 42 U.S.C. § 1201(c) ("shall not be used as a subterfuge to evade the purposes of" the ADA) (emphasis added). However, I do not believe that this change is sufficient to avoid the mandate of McMann and Betts.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civ. No. 96—1991 (DRD)
OPINION

COLLEEN FORD,

Plaintiff,

v.

SCHERING-PLOUGH CORPORATION;SCHERING CORPORATION; and METROPOLITAN LIFE INSURANCE COMPANY,

Defendants.

Appearances

Maureen S. Binetti, Esq.
WILENTZ, GOLDMAN & SPITZER
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095—0958

SEP 12,1996
Attorneys for the Plaintiff

WILLIAM T. WALSH, CLERK
Sondra Modell Hirsch, Esq.
Law Office of Joseph Trovato, Esq.c/o Metropolitan Life

Insurance Company
9 Law Drive
Fairfield, New Jersey 07004
Attorneys for Defendant Metropolitan Life Insurance Company

Lee E. Miller, Esq.
SHANLEY & FISHER
131 Madison Ave.
Morristown, New Jersey 07962-1979
Attorneys for Defendants Schering-Plough Corporation and Schering Corporation

DEBEVOISE. Senior District Judge.

Defendants Metropolitan Life Insurance Company ("MetLife"), Schering-Plough Corporation and Schering Corporation (collectively "Schering") move to dismiss, or in the alternative for summary judgment on, the plaintiff's, Colleen Ford, complaint. For the reasons set forth below, defendants' motion to dismiss will be granted.

BACKGROUND

Plaintiff Colleen Ford was an employee of Schering from 1975 to May 1992, when she became totally disabled because of a mental disorder which persists to date. As a Schering employee, plaintiff was covered for long term disability (LTD) benefits under the employee welfare benefits plan ("Plan") provided to Schering employees. MetLife issued a Group Policy to Schering to eligible Plan participants. Under the Plan, plaintiff was entitled to monthly LTD

benef.its in November 1992, six months after she became disabled.'

The Plan provides, and has provided since at least 1985, that benefits for mental disabilities, such as plaintiff's disability, terminate after twenty-four months. Benefits are available for physical disabilities until age sixty—five, so long as the disability persists. Plaintiff received benefits under the Plan for 24 months, until November 23, 1994, when the benefits were terminated in accordance with the terms of the Plan.

On November 8, 1995, the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On January 31, 1996, the EEOC issued plaintiff a "right-to-sue" letter. On April 29, 1996, plaintiff filed a three-count complaint against Schering and Hetlife, alleging unlawful discrimination under the Americans with Disabilities Act of 1990, 42 U.S.C.§ 12101 et *seq.* ("ADA"). The essence of plaintiff's complaint is that the defendants violated plaintiff's rights under the ADA because the Plan, as part of its design, includes a provision that long term disability benefits terminate after twenty-four months for individuals with mental disabilities, while individuals with physical disabilities are eligible for benefits until age sixty-five if their physical disability persists.

Presently, both Schering and MetLife move to dismiss .the plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Alternatively, the defendants move for summary judgment.

RULE 12(b) (6) STANDARD

Pursuant to Rule 12(b)(6), a plaintiff's complaint must be dismissed for failure to state a claim if a defendant demonstrates "beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45—46 (1957); Craftmatic Securities Litigation v Kraftsow, 890 F.2d 628, 634 (3d Cir. 1989); Johnsrud v. Carter, 620 F.2d 29, 33 (3d Cir. 1980). All allegations set forth in the complaint must be accepted as true, see Cruz v. Beto, 405 U.s. 319, 322 (1972), and all reasonable inferences must be drawn in the plaintiff's favor. Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991). on a 12(b)(6). motion, the district court is limited to the facts alleged in the complaint, not those raised for the first time by counsel in its legal memorandum. Hauptmann v. Wilentz, 570 F.Supp. 351, 364 (D.N.J. 1983), aff'd without opinion, 770 F.2d 1070 (3d Cir. 1985), cert. denied, 474 U.S. 1103 (1986); Seevers v. Arkenberg, 726 F. Supp. 1159, 1165 (S.D. Ind. 1989)("This court is not at liberty, however, to consider allegations which do not appear in the complaint, but which are averred only in legal briefs."). The Third Circuit, however, has held that a "court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss," without converting the motion into a motion for summary judgment, "if the plaintiff's claims are based on the document." Pension Ben. Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 114 S.Ct. 687 (1994).

DISCUSSION

This court has jurisdiction over the present case pursuant to 28 U.S.C. § 1331 (federal question).

Plaintiff's Claims Under Title I of the ADA

Title I of the ADA addresses disability discrimination by employers; it forbids discrimination against individuals with disabilities in the employment context. Section 102(a) of Title I of the ADA states the general rule against discrimination as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). (Emphasis added).

A qualified individual with a disability is defined, in pertinent part, as:

> [A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C.§ 12111(8). (Emphasis added).

In the present case, it is undisputed that plaintiff is totally disabled. Defendants assert that since plaintiff is

totally disabled and cannot perform the essential functions of any employment positions which she holds or desires, by definition she is not a "qualified individual" under the ADA and thus does not have standing to bring a Title I claim.

In support of their position, defendants cite two recent cases with very similar facts and issues to the present case, Parker v. Metropolitan Life, Ins. Co., 875 F. Supp. 1321 (W.D. Tenn. 1995), appeal filed, No. 95—5269 (6th Cir. Feb. 15, 1995), and EEOC v. CNA Insurance Companies, 1996 WL 26879 (N.D.Ill 1996), appeal pending, No. 96-1304 (7th Cir.). *Parker,* a case with exact same defendants and issues as the present case, involved a challenge to a long-term disability plan that provided less benefits for mental disabilities than for physical disabilities. Id. at 1325. The plaintiff in Parker, who had worked for one of the defendants since 1981, had become disabled in 1990. Id. at 1324. The plaintiff remained disabled and was no longer working at the time the action was brought. Id. The defendants argued that the plaintiff was not entitled to the ADA's protection because she was not a "qualified individual with a disability.' Id. at 1325.

The Court, relying on the Eighth Circuit's interpretation of the Rehabilitation Act in Beau ford v. Father Flanagan 's Boys' Home, 831 F.2d 768 (8th Cir. 1987), cert. denied, 485 U.s. 938 (1988), dismissed the plaintiff's claims under Title I of the ADA. Parker, 875 F.Supp. at 1326. The court stated that "the plain language of the Act clearly indicates that the ADA was designed to afford relief only to those individuals with disabilities who can perform the essential functions of the job that they hold or seek.' Id. In addition, the court stated that other courts had found that "only persons with disabilities who are

'qualified' for the position they hold or desire may state a claim for discrimination under the Act.' Id. (citing Tyndall V. Nat. Educ. Centers, 31 F.3d 209 (4th Cir. 1994)).

The facts of EEOC v. CNA are also remarkably similar to those in Parker and to those in the present case. In *CNA*, a former employee had her LTD benefits for mental disability limited to two years while benefits for all other disabilities were to be paid to age sixty-five. The EEOC brought suit on behalf of the former employee to enjoin the insurance companies from ceasing to pay disability benefits after the two years limit. The *CNA* court followed the Parker analysis and reached the same result, i.e., a plaintiff who is totally disabled and who cannot perform the essential functions of any employment position is not a "qualified individual" under the ADA and thus has no standing to sue under Title I (see also a recent case, Gonzales v. Garner Food Services, Inc., No. 95—8533, 1996 U.S. App. LEXIS 19012 (11th Cir. Aug. 2, 1996)). I am not persuaded that these courts erred.

Applying Parker, CNA, and Gonzalez to the case at hand yields a similar result. It is undisputed that plaintiff here is totally disabled; thus she is not a "qualified individual with a disability" within the definition of Title I of the ADA. Therefore, plaintiff has no standing to sue under Title I of the ADA. Accordingly, plaintiff.'s claim under Title I as it pertains to defendants Schering and MetLife will be dismissed.[2]

Plaintiff's Claims Under Title III of the ADA

Title III is concerned with public accommodations and access for people with disabilities. It does not concern discrimination in employment. The Act defines public

accommodation to include a "aundromat, dry-cleaner, bank, ... insurance office, professional office of a health care provider, hospital, or other service establishment," 42 U.S.C. § 12181(7)(F). An issue similar to that in the present case arose in Parker, supra. The Parker court concluded that there was no nexus whatsoever between the plaintiff's alleged discrimination and her inability to make physical use of any of defendant's services. *Id.* at 1327. The court found that Title III only addresses discrimination

based on a disabled person's physical abilities to make use of the goods and services of a place of public accommodation. Id. at 1328. Likewise, in the present case, there is no relationship between Ford's alleged discrimination and her ability to make physical use of any of MetLife's services. Both handicapped and unhandicapped employees of Schering were able to subscribe to the Schering LTD plan. Accordingly, Ford has failed to state a claim under Title III of the ADA upon which relief can be granted.

Plaintiff's Claims Under Title V of the ADA

42 U.S.C. § 12201(c), contained in Title V of the ADA and entitled "Construction," provides in relevant part:

> Subchapters I through III of this chapter and Title IV of the Act shall not be construed to prohibit or restrict -
>
> (1) an insurer, hospital or medical servicecompany,. health maintenance

> organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bonafide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bonafide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapters I and III of this chapter.

This provision, also known as "Section 501(c)," however, does not create a separate cause of action under the ADA. Section 501(c) is merely one step in the analytic framework under Title I of the ADA. In discussing the significance of Section 501(c), the Parker court noted that:

> The legislative history of Title V reiterates that the main purposes of the ADA include prohibiting discrimination in employment,

> public services, and places of public accommodation and that no provisions of the ADA should affect the way the insurance industry does business in accordance with the State laws and regulations under which it is regulated... Thus, Title V governs the interplay between the Act's anti-discrimination provisions in Title I, II and III and health insurance plans offered by employers to their workers, and nothing in the legislative history of the Act suggests that claims may be brought independently under this section of the ADA. Parker, 875 F.Supp. at 1327 n.7.

Consistent with this reasoning, plaintiff cannot state an independent claim under Section 501(c). Accordingly, it will be dismissed.

There is persuasive authority suggesting that a provision for different benefit levels in a health or disability plan available equally to those who are handicapped and those who are not does not violate the ADA. Brenner v. Comtroller of the State of New York, 1996 U.S. App. LEXIS 2430 (2d Cir Jan. 16, 1996); Modderno **V.** King, 82 L.3d 1059 (D.C.C. 1996); Harding Winn-Dixie Stores, Inc., 907 L.Supp. 386 (M.D. Fla. 1995); EEOC Interim Policy Guidance, June 8, 1993, reprinted in Americans With Disabilities Act Manual (BHA) at 70; 1051—1053. Because I have concluded on the basis of the *facts* alleged in the complaint that plaintiff does not have standing under the ADA to raise her Title I claim, offering the LTD Plan did not violate Title III, and Title V does not create a separate cause of action under ADA, it is unnecessary to reach the question whether the disparity in the Schering Plan's level of disability

benefits for mental and physical conditions violates the ADA.

CONCLUSION

For the reasons set forth above, plaintiff's complaint under Title I, III, and V of the ADA will be dismissed. An appropriate order will be issued.

s/ _____
Dickinson R. Debevoise, U.S.D.J.

Date: September 12, 1996

Footnotes

1 Plaintiff was also found to be disabled for purposes of receiving Social Security disability benefits.

2 In view of this conclusion it is unnecessary to address MetLife's and Schering's contentions that plaintiff failed to file a charge of discrimination with the EEOC within 300 days from the date of the alleged discriminatory act as required by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e— 5(e). It is also unnecessary to address MetLife's contention that it is not a "covered entity" against which a Title I claim can be brought.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 96-5674

COLLEEN V. FORD,

Appellant

v.

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY

Present: Mansmann, Cowen, and Alito, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 28, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court dated September 12, 1996 and entered September 13, 1996, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: MAY 2 2 1998

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 96-5674

COLLEEN V. FORD,

Appellant

v.

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, MCKEE, and RENDELL,
Circuit Judges

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

The Statutes in Question

Title 1 of the Americans With Disabilities Act, 42 U.S.C. § 12101(b) provides in relevant part as follows:

(b) Purpose

It is the purpose of this chapter—

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> . . .
>
> (4) to invoke the sweep of congressional authority, including the power to invoke the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Title I of the Americans With Disabilities Act, 42 U.S.C. § 12102(2) provides as follows:

(2) Disability

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Title I of the Americans With Disabilities Act, 42 U.S.C. §12112(a) and (b) provides in relevant part as follows:

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

. . .

> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association . . .

Title III of the Americans With Disabilities Act, 42 U.S.C. § 12181(7)(F), provides as follows:

> (7) Public Accommodation
>
> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—
>
> > (F) a laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment . . .

Title III of the Americans With Disabilities Act, 42 U.S.C. § 12182(a) provides as follows:

> (a) General Rule
>
> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any

person who owns, leases (or leases to), or operates a place of public accommodation.

Title III of the Americans With Disabilities Act, 42 U.S.C. § 12182(b) provides in relevant part as follows:

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with

disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied service, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden . . .

Title V of the Americans With Disabilities Act, 42 U.S.C. § 12201(c), provides as follows:

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

(2)

No. 98-529

FILED

OCT 28 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

COLLEEN V. FORD,

Petitioner,

vs.

SCHERING-PLOUGH CORPORATION; SCHERING CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION

THOMAS F. CAMPION
Counsel of Record
JOHN D. CLEMEN
SHANLEY & FISHER, P.C.
Attorneys for Respondents Schering-Plough Corporation and Schering Corporation
131 Madison Avenue
Morristown, New Jersey 07962
(973) 285-1000

149325

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

19 pp

STATEMENT PURSUANT TO RULE 29.6

Respondent Schering-Plough Corporation is the parent corporation of Respondent Schering Corporation; Respondent Schering Corporation is a wholly-owned subsidiary of Respondent Schering-Plough Corporation.

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INTRODUCTION

This Court has limited resources in which to review thousands of petitions, and many clamoring voices urging the importance of each issue. Just months ago, this Court was presented with a petition asking for review of the precise issues raised in this case, involving identical respondents and the same long-term disability policy. *Parker v. Metropolitan Insurance Company*, 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 871 (1998). Now the Third Circuit has reached the same conclusions concerning the Americans with Disabilities Act as did the *Parker* court. *Ford v. Schering-Plough Corporation*, 145 F.3d 601 (3rd Cir. 1998). This Court should deny certiorari in this case just as it did in *Parker*, as the decision below is squarely in line with consistent and well-reasoned precedent from the Courts of Appeal.

REASONS FOR DENYING THE WRIT

I.

DISPARITY IN INSURANCE BENEFITS BETWEEN MENTAL AND PHYSICAL DISABILITY DOES NOT VIOLATE THE ADA.

The argument advanced by the petitioner in this litigation is that disparity between mental and physical health benefits violates Titles I and III of the Americans with Disabilities Act (ADA). Respondent submits, and several courts considering this issue agree, that the petitioner's argument is without merit. The Third Circuit correctly held that:

> So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has

> occurred even if the plan offers different coverage for the various disabilities.

Ford, 145 F.3d at 608.

Petitioner bases her argument on provisions of Titles I and III. Petitioner argues that under Title I, the purpose of the ADA is

> to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [by] invok[ing] the sweep of congressional authority.

42 U.S.C. § 12101(b)(1), (4). Petitioner further argues her Title I point by stating that the ADA prohibits discrimination against a qualified disabled individual "because of the disability of such individual." 42 U.S.C. § 12112(a). As for Title III, petitioner bases her argument on the following language:

> It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

42 U.S.C. § 12182(b)(1)(A)(i). However, a fair reading of these statutes compels the conclusion that there is no discrimination as long as the covered entity offers its benefits, contractual and otherwise, to all individuals and classes of individuals on an equal basis, regardless of any disability. In particular, this provision of Title III does not mandate that an entity must

provide certain benefits, but that the benefits and opportunities an entity does provide must be accessible to disabled individuals.

The view that not all disabilities need be treated identically under the ADA is supported by decisions from the Sixth, Seventh, D.C., Eighth, Second, and Third Circuits. In *Parker v. Metropolitan Life Insurance Company*, 121 F.3d 1006, 1019 (6th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 871 (1998), a case identical to this one on the issues and the identity of the defendants, the Sixth Circuit held that there is no discrimination under the ADA if all employees, whether disabled or not, receive the same access to the long-term disability plan. This issue has recently come before the Sixth Circuit again, and that court has held true to its previous ruling. *Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453, 453 (6th Cir. 1998) (holding that denial of coverage for heart transplant did not violate the ADA, as the "ADA does not prohibit health insurance providers from differentiating between persons with different disabilities.")

In *Equal Employment Opportunity Comm'n v. CNA Ins. Co.*, 96 F.3d 1039 (7th Cir. 1996), the Seventh Circuit held that when all employees, the perfectly healthy and the physically and mentally disabled, receive the same long-term benefits from their employer, there is no ADA violation even if the mental benefits are significantly less than the physical benefits. *Id.* at 1044. The Seventh Circuit refused plaintiff's invitation to broaden the scope of the ADA beyond what Congress intended:

> Without far stronger language in the ADA supporting this result, we are loath to read into it a rule that has been the subject of vigorous, sometimes contentious, national debate for the last several years. Few, if any, mental health advocates have

> thought that the result they would like to see has been there all along in the ADA.

Id. See also Modderno v. King, 82 F.3d 1059 (D.C. Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 772 (1997) (holding that the Foreign Service Benefit Plan's disparity in benefits between mental illness and physical illness is permissible); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996) (holding that insurance distinctions for infertility which are applied equally to all employees do not discriminate on the basis of disability); *Brennen v. Comptroller of the State of New York*, 100 F.3d 942, 1996 WL 19057 (2d Cir. 1996) (holding benefits extended to one category of disabled persons need not be extended to all other categories); *Doe v. Colautti*, 592 F.2d 704 (3rd Cir. 1979) (holding that a state's medical assistance statute need not treat every disability equally).

This conclusion is also supported by decisions of this Court in the context of the Rehabilitation Act of 1973. In *Alexander v. Choate*, 469 U.S. 287, 302, 105 S. Ct. 712 (1985), this Court held that a limit on in-patient hospital care which did not distinguish between

> those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having

is not discriminatory under the Rehabilitation Act. Similarly, this Court in *Traynor v. Turnage*, 485 U.S. 535, 549, 108 S. Ct. 1372 (1988), held that it is permissible to extend benefits for one disability and not another:

> There is nothing in the Rehabilitation Act that requires that any benefit extended to one category

> of handicapped persons also be extended to all other categories of handicapped persons.

Decisions concerning the Rehabilitation Act of 1973 have guided courts in their interpretation of the ADA. *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995).

The position that different levels of coverage for mental and physical disabilities do not violate the ADA also enjoys strong legislative support. In reaching its decision, the Third Circuit in *Ford* examined the Senate Labor and Human Resources Committee report, which states in pertinent part:

> [W]hile it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for mental health coverage, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery. . . .

S. Rep. No. 101-116, at 29 (1989), *cited in Ford*, 145 F.3d at 610. In addition, both the *Ford* and *Parker* courts considered Congress' enactment of the Mental Health Parity Act, 42 U.S.C. § 300gg-5, on September 26, 1996, which states that a health insurance plan containing no annual or lifetime limits on medical or surgical benefits affecting physical health may not contain such limits on mental health benefits. Both courts came to the same obvious conclusion:

> Congress' passage of the Mental Health Parity Act suggests Congress believed that the ADA neither governs the content of insurance policies nor requires parity between physical and mental illnesses . . .

Parker, 121 F.3d at 1018; *see Ford*, 145 F.3d at 610.

Petitioner in this case has asserted a position which has been soundly rejected by overwhelming authority from this Court and runs contrary to relevant legislative history. Petitioner was never denied any benefit of employment because of her disability; she received the same insurance and long term disability benefits as all the employees of Schering-Plough. Petitioner wishes to stretch the confines of the ADA to fit her claim. In doing so her reading grossly distorts the intent of the ADA.

II.

CARPARTS IS AN ANOMALY IN ADA JURISPRUDENCE.

Petitioner's reliance upon *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), is misplaced. Refusing to interpret the lone phrase "insurance office" within its proper context of a laundry list of primarily physical structures, *see* 42 U.S.C. § 12181(7), the First Circuit erroneously held that Title III is not limited to physical structures. *Id.* The First Circuit's reasoning is unsubstantiated and has been discredited by several sound decisions. Two circuit courts have expressly declined to follow *Carparts*, *see Ford*, 145 F.3d at 613-14; *Parker*, 121 F.3d at 1013-14, and its holding concerning Title III places of public accommodation has been rejected in principle by several circuit and district courts. *See Menkowitz v. Pottstown Memorial Med. Ctr.*, No. 97-2041, 1998 U.S. App. LEXIS 20720 (3rd Cir. 1998); *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580, 582-83 (6th Cir. 1995), *cert. denied*, 516 U.S. 1028, 116 S. Ct. 674 (1995) (holding that "[i]t is all of the services which the public accommodation offers, not all service which the lessor of the public accommodation offers which fall within the scope of Title III."); *Sandison v. Michigan High School*

Athletic Ass'n, 64 F.3d 1026, 1036 (6th Cir. 1995) (holding that the "critical inquiry will typically be the nature of the *place* to which the disabled individual alleges unequal access."); *Leonard F. v. Israel Discount Bank*, No. 95-6964, 1997 U.S. Dist. LEXIS 9342 (S.D.N.Y. 1997) (holding that Title III does not pertain to employment practices); *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217 (E.D. Mo. 1996) (holding that an organization is not a place of public accommodation); *Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616 (S.D. Ohio 1994) (holding that Title III is inapplicable to a denial of health insurance benefits to disabled family members).

The existence of the *Carparts* decision is insufficient ground to merit a writ of certiorari. A great many courts have considered the issue and have agreed that Title III governs accessibility to public accommodations. Only the First Circuit has adopted this misplaced view of public accommodation under Title III, a view not supported by a fair reading of the ADA. No other circuit court has given this interpretation any credence.

III.

PETITIONER IS NOT A QUALIFIED INDIVIDUAL WITH A DISABILITY AND CANNOT MAINTAIN AN ACTION UNDER TITLE I OF THE AMERICANS WITH DISABILITIES ACT.

The Third Circuit disagreed with that part of the district court opinion below, which held that petitioner could not maintain a Title I action because she is not a "qualified individual with a disability," as required by the statute.

Although we believe that the Title I standing analysis employed by the district court below was correct, the circuit court's contrary view on the issue has no bearing on this

petition. The reason is that both courts agreed on the merits of petitioner's Title I claim, i.e., parity of benefits is not mandated by any title of the ADA. Consequently, the differing approaches of the courts below on that issue provide no basis for granting this petition.

The petitioner does not have standing under Title I of the Americans with Disabilities Act (ADA). Title I prohibits employment discrimination against a "qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

It is undisputed that Congress intended the ADA to have a comprehensive reach, *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763 (E.D. Tex. 1996). All parties agree that Congress intended to end disability-based discrimination in several different contexts, including the employment relationship. However, Congress included the phrase "essential functions" in the definition of a qualified individual with a disability to

> ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., the non-marginal functions of the job . . .

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 55 (1990).

The proper analysis of this issue begins with the proposition that clearly drafted statutes must be applied as written by Congress. *Smith v. United States*, 508 U.S. 223, 113 S. Ct. 2050

(1993). The petitioner has admitted to courts below and to this Court that she is utterly unable to continue in her position at Schering-Plough, with or without any accommodation. Therefore, petitioner is not a qualified individual with a disability and does not meet the primary criteria for standing under the plain language of Title I.

Although the Third Circuit did reach the same ultimate conclusion that petitioner's ADA claims lack merit, we respectfully disagree with that aspect of the Third Circuit's decision below which found petitioner had standing to sue. *Ford v. Schering Plough Corp.*, 145 F.3d 601 (3rd Cir. 1998). The Third Circuit examined provisions in Title VII of the Civil Rights Act of 1964 in conjunction with this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843 (1997), to remedy the ambiguity the Court perceived in the phrase "qualified individual with a disability". *Ford*, 145 F.3d at 606. However, there is no need to turn to Title VII to interpret the ADA. Congress created a well-designed, well-crafted statute in the ADA. The plain language of the statute, "qualified individual with a disability," answers all perceived ambiguities. An individual must be *qualified* to perform the essential functions of his or her job when one brings suit under the ADA. When petitioner admits she is unable to perform any of her job duties, with or without a reasonable accommodation, this should be the end of the inquiry under the ADA.

Respondent's position on this issue is far from unique. The Seventh Circuit in *Equal Employment Opportunity Commission v. CNA Insurance Company*, 96 F.3d 1039, 1045 (7th Cir. 1996), rejected the Title VII analogy and found the claimant did not have standing because she did not meet the statutory requirement of "qualified individual with a disability". The Court examined the plain language of Title I and questioned "how a person who is no longer able to hold an 'employment

position' fits within this definition." *Id.* at 1043. In *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523, 1527-28 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1822 (1997), the Eleventh Circuit similarly found that the plain language of the ADA and its legislative history indicate that Congress intended to limit Title I protections to persons who could perform the essential functions of the job.

Petitioner's ADA claim is controlled by the plain, unambiguous language of Title I. The most elementary and time-tested rule of statutory construction applies here: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous . . . 'that language must ordinarily be regarded as conclusive.' " *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163, 1169 (1993) (citations omitted); *see also Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373, 106 S. Ct. 681 (1986) (the "purpose" of a statute is determined first by examining its plain language). Petitioner's construction of Title I is demonstrably at odds with the language and Congressional intent expressed in the statute. Under the plain language, which speaks for itself, petitioner is not a qualified individual with a disability and therefore is not eligible for benefits under Title I.

IV.

THE EEOC AND DEPARTMENT OF JUSTICE INTERPRETATIONS OF THE ADA ARE INCORRECT.

The EEOC took the position below that petitioner's claim is encompassed by Title I, and that the definition of "qualified individual" is ambiguous. We have already addressed why this argument lacks merit, but we further note that the EEOC's interpretations of statutes are often incorrect. In *Torres v.*

National Precision Blanking, 943 F. Supp. 952 (N.D. Ill. 1996), a case involving claims of sexual harassment under Title VII, the Court was prompted to comment on the soundness of the EEOC's position in litigat on:

> The court is mindful that the EEOC is a frequent litigator in federal courts. . . . Moreover, *the court notes that the EEOC is also a frequent loser in litigation*; not all of its arguments prevail.

Id. at 955-56 n.7 (emphasis added).

The Department of Justice argues that the Title III phrase "public accommodation" applies not just to physical access to facilities, but to the content of services provided by a business. This view contradicts the Department's own regulations, which are promulgated pursuant to 42 U.S.C. §§ 12186(b), 12206(a)(1):

> The purpose of the ADA's public accommodation requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided.

28 C.F.R. pt. 36, app. B, at 640 (1997), *cited in Ford*, 145 F.3d at 613. An example given in these regulations is that a bookstore must be accessible to disabled individuals, but need not sell braille or large print books. *Id.* This Court does not owe any deference to the clearly erroneous, and sometimes contradictory, interpretations of the ADA by either the EEOC or the Department of Justice. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171, 109 S. Ct. 2854 (1989) (holding that "no deference is due to agency interpretations at odds with the plain language of the statute itself").

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the petition should be denied.

Respectfully submitted,

THOMAS F. CAMPION
Counsel of Record
JOHN D. CLEMEN
SHANLEY & FISHER, P.C.
Attorneys for Respondents
Schering-Plough Corporation
and Schering Corporation
131 Madison Avenue
Morristown, New Jersey 07962
(973) 285-1000

FILED
NOV 20 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-529

In The

Supreme Court of the United States

October Term, 1998

COLLEEN V. FORD,

Petitioner,

vs.

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

ALLAN M. MARCUS
Counsel of Record
One Madison Avenue
New York, NY 10010-3690
(212) 578-3722

ALLEN I. FAGIN
RONALD S. RAUCHBERG
AARON J. SCHINDEL
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

Attorneys for Respondent Metropolitan Life Insurance Company

STATEMENT PURSUANT TO RULE 29.6

Metropolitan Life Insurance Company has no parent company; its affiliates and subsidiaries, other than wholly-owned subsidiaries are listed in Appendix A to this brief.

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APPENDIX

Appendix A — Statement Pursuant To Rule 29.6 ... 1a

Respondent Metropolitan Life Insurance Co. ("MetLife") respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Third Circuit in *Ford v. Schering-Plough Corp.*

STATEMENT OF THE CASE

Petitioner Ford's claims arise out of the administration of an employee welfare benefits plan (the "Plan") provided by Schering-Plough Corporation ("Schering") to its employees, including Ford. Respondent Metropolitan Life Insurance Company ("MetLife") issued a group insurance policy to Schering to fund the long term disability ("LTD") benefits provided under the Schering Plan; MetLife also administered claims for LTD benefits under the Plan.

The insurance policy in question was not sold to the general public. At no time did Ford seek to buy or otherwise obtain any goods or services from MetLife, and at no time was she denied the opportunity to do so. The group insurance policy at issue here was available only to employers — such as Schering — as a vehicle for them to provide to their employees the level of long term disability benefits that they had decided to provide under their employee benefit plans. In this case, all Schering employees, disabled and nondisabled, were provided with the same degree of protection against the risk of becoming unable to work: the Plan provided LTD benefits for varying periods; benefits ceased after two years for an employee disabled by a mental or nervous condition who was not hospitalized, while benefits continued to age 65 for employees who could not work by virtue of physical disorders.

Ford contends that the disparity in the level of disability benefits payable for mental and physical conditions violates

the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (the "ADA"), specifically, Title I, the "employment" section of the ADA[1], Title III, the "public accommodations" section of the ADA[2], and Title V, the rule of construction (or safe harbor) for insurance plans.[3]

---

1. Title I provides in relevant part (at 42 U.S.C. § 1212(a)):

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employee's, employee compensation, job training and other terms, conditions, and privileges of employment.

2. Title III provides in relevant part (at 42 U.S.C. § 12182(a)):

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

3. Section 501(c) of the ADA, 42 U.S.C. § 12201(c), provides in relevant part:

> (c) Insurance
>
> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict —
>
> (1) an insurer . . . or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(Cont'd)

Ford filed her complaint against Schering and MetLife on April 29, 1996. MetLife and Schering filed motions to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), or, in the alternative, for summary judgment, on June 18, 1996. District Judge Debevoise dismissed the complaint against the defendants on September 12, 1996, holding in relevant part that: (i) Ford failed to state a claim under Title I of the ADA because she was not a "qualified individual with a disability" as that term is defined in the statute; (ii) Ford failed to state a claim under Title III of the ADA because she was not deprived of access to MetLife's goods and services; and (iii) Ford failed to state a claim under Title V of the ADA because that Title does not create an independent cause of action. *See* Slip Opinion of District Court (Pet. App. at 38a-47a).

Ford appealed to the United States Court of Appeals for the Third Circuit, which affirmed the district court's decision. Of particular relevance here, the Third Circuit held that the ADA did not prohibit employers or insurance companies from providing different levels of benefits for different conditions.

(Cont'd)

> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

"So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status," the court stated,

> then no discrimination has occurred even if the plan offers different coverage for different disabilities. The ADA does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA.

Indeed, the question whether providing different levels of benefits for different broad categories of conditions constitutes discrimination on the basis of disability is not new, and the Third Circuit based its conclusion on its own precedent and the consistent holdings of this Court and the Sixth, Seventh, Eighth and D.C. Circuits. The court also relied on the compelling evidence of Congress's actions since the enactment of the ADA: twice Congress has considered, and once enacted, legislation specifically addressing the question whether employer-provided benefits for mental conditions must be identical to the benefits provided for physical conditions. On neither occasion did the Congressional debates reflect a belief that the question had already been resolved by the ADA, and on neither occasion did Congress prohibit the existing practice of providing different benefit levels for physical and mental conditions in LTD plans.

The Third Circuit further held that Schering and MetLife were not required under Section 501(c) of the ADA,[4] to present actuarial data to prove that the disparities in benefits were not a subterfuge to evade the purposes of the Act. The panel looked

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4. 42 U.S.C. § 12201(c), quoted in note 3, *supra*.

to this Court's holding in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), construing language under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), that is nearly identical to the language used in the later-enacted ADA, and the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), which leaves the regulation of insurance to the states, as support for this holding. The court observed that requiring insurers to justify their policy coverage would represent a "seismic shift in the insurance business" and would improperly place the federal courts in the role of "watchdog of the insurance business."

With specific regard to Petitioner's Title III claim, the Third Circuit held that the ADA's prohibition on discrimination by "place[s] of public accommodation" was not implicated here. Title I, not Title III, governs discrimination in employment practices, and, in its sale of a group insurance plan to an employer, MetLife was functioning neither as a "place" nor as a "public accommodation," the court held. Although MetLife maintains insurance offices at which certain of its products are sold to the public, the court reasoned that no nexus existed between Petitioner, who received benefits through her employer, and MetLife's insurance offices. What the Petitioner sought here, the court concluded, was not equal access to the goods and services provided by a place of public accommodation. Rather, she sought to extend the scope of the ADA to regulate the *content* of MetLife's insurance policies which, the court held, the statute does not do.

SUMMARY OF REASONS FOR DENYING REVIEW

Arguing against the consistent holdings of four circuit courts of appeals, Ford has invoked a false conflict in an attempt to persuade this Court to expand the scope of the ADA beyond the plain meaning of the statute and the clear intention of

Congress. Ford's petition should be denied because the circuit courts have uniformly held that the ADA does not regulate the content of insurance policies and does not require benefit parity — there is no split among the circuits with regard to these issues. Indeed, the identical contention raised by Ford in this case was raised by the Petitioner in *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 871 (1998), which this Court declined to review.

The Third Circuit properly dismissed Petitioner's Title I and Title III claims because there was no discrimination here among Schering employees within the meaning of the ADA. All Schering employees faced some risk of becoming unable to continue to earn a livelihood by reason of disability. All Schering employees — both those fully able and those having some disability — were treated identically and given the same degree of protection against that risk. That this is not discrimination under the ADA is the precise holding of *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 and *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996).

Furthermore, the Third Circuit properly reasoned that recent Congressional consideration of legislation to require parity in insurance benefits for mental and physical illnesses conclusively demonstrates that Congress never intended the ADA to preclude such distinctions. While twice considering the issue of benefit parity after the enactment of the ADA, Congress has never extended this concept to long-term disability benefits.

Under Ford's theory, the scope of Title III of the ADA would impermissibly extend beyond the guarantee of equal access by disabled persons to the goods and services offered by places of public accommodation to regulation of the substantive content and design of those goods and services.

Courts would replace state insurance commissioners as regulators of the content and design of insurance policies, and play the role of "super-underwriters," thereby undermining the traditional and commonplace risk classification practices of insurers. There is simply no support in the ADA, nor in its legislative history, nor in its regulations, nor in the case law, for such a vast conceptual expansion of the scope of protections afforded by the ADA.

In any event, questions concerning the obligations of places of public accommodation — which Petitioner asserts (incorrectly) are worthy of this Court's review — are simply not presented in this case. The group insurance policy at issue here was sold only to employers, to provide employee benefits; it was never offered for sale to the public. Thus, this case has nothing to do with any "place" of public accommodation, and the Court would therefore never reach any questions concerning the obligations imposed by the ADA on such a "place."

Finally, to argue, as Petitioner does, that section 501(c) *expands* the scope of ADA coverage to insurance practices and the contents of insurance products rather than expressly *limiting* the coverage of the ADA (consistent with the McCarran-Ferguson Act) to exclude the traditional business of insurance, flies in the face of the plain and unambiguous statutory language and the clear intent of Congress. Even if Title V were implicated in this case, Petitioner fails to present any issue warranting discretionary review because the Third Circuit properly held, consistent with this Court's holdings and the holdings of its sister circuits, that MetLife was not required to provide an actuarial justification for its group policy that provided different levels of benefits for specified categories of conditions.

REASONS FOR DENYING REVIEW

I.

THE CIRCUIT COURTS HAVE UNIFORMLY HELD THAT THE ADA DOES NOT REQUIRE BENEFIT PARITY, AND RECENT CONGRESSIONAL ACTION SUPPORTS THIS INTERPRETATION; THEREFORE, REVIEW IS NOT WARRANTED.

Consistent with this Court's decisions under the Rehabilitation Act of 1973 (predecessor to the ADA)[5] and the decisions of the four other circuit courts to have considered the issue, the Third Circuit held that the ADA is not violated where an employer offers all its employees, whether nondisabled or disabled, the same benefit plan. It is not contested that *every* Schering employee, whether nondisabled or disabled, is treated precisely the same with respect to the Plan. Nevertheless, Petitioner urges this Court to exercise its supervisory authority and grant her petition to correct what she believes is an erroneous interpretation of the ADA. Petitioner's bare assertion of error, devoid of any legal support, does not present a compelling reason for this Court to grant review.

A. The Courts Have Consistently Held That the ADA Does Not Prohibit a Disparity in Benefits Under a Group Long Term Disability Plan So Long As That Disparity is Applied to Everyone Equally.

The LTD Plan provided by Schering offers the same degree of protection to all Schering employees — whether disabled or

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5. The ADA provides that its provisions be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973." 42 U.S.C. § 12117(b).

nondisabled. No employee was denied coverage, required to pay a higher premium, or afforded reduced benefits because that employee had a disability. Indeed, Ford does not complain that she was not provided the same plan with the same coverage and at the same cost offered to other Schering employees.

The circuit courts have repeatedly and uniformly held that the provision of different benefit levels for different broad categories of conditions — including different benefits for mental or nervous conditions compared with physical conditions — is not discrimination within the meaning of the ADA. The Third Circuit correctly concluded that (Pet. App., 15a):

> While the defendants' insurance plan differentiated between types of disabilities, this is a far cry from a specific disabled employee facing differential treatment due to her disability. Every Schering employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every Schering employee received equal treatment. So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities. The ADA does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA.

Considering the same Schering LTD Plan, the Sixth Circuit en banc in *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d at 1015-16, held that the ADA did not prohibit Schering from providing the LTD Plan to its employees, including the provision limiting benefits for disabilities due to mental disorders, because all

employees, both disabled and nondisabled, received equal access to the benefits offered under the Plan. The Seventh Circuit in *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039, also rejected the suggestion that a long-term disability plan that provided benefits to age 65 for physical disabilities but only for two years for mental or nervous disabilities violates the ADA, holding:

> [The employer] did not charge higher prices to disabled people, on the theory that they might require more in benefits. Nor did it vary the terms of its plan depending on whether or not the employee was disabled. All employees — the perfectly healthy, the physically disabled, and the mentally disabled — had a plan that promised them long-term benefits from the onset of disability until age 65 if their problem was physical, and long-term benefits for two years if the problem was mental or nervous. This may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense of the term.

96 F.3d at 1044 (citations omitted).[6]

The Eighth Circuit reached a similar conclusion in *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674. The plaintiff there sued her employer under the ADA (among other statutes) because the company's medical insurance plan did not cover her treatments for infertility — which she challenged as "a

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6. Contrary to plaintiff's assertion, the Seventh Circuit's reliance on *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), *rev'd*, 519 U.S. 337 (1997), in its discussion of the plaintiff's standing as a former employee does not undermine the court's reasoning on the entirely separate issue whether disparities in disability benefits can be considered discrimination. Moreover, far from being "discredited" (Petition, p. 20), the district court decision in *Parker* was affirmed by the en banc Sixth Circuit.

disability-based distinction." The Eighth Circuit rejected this contention, on the grounds that:

> the Plan's infertility exclusion does not single out a particular group of disabilities, allowing coverage for some individuals with infertility problems, while denying coverage to other individuals with infertility problems. Rather, the Plan's infertility exclusion applies equally to all individuals, in that no one participating in the Plan receives coverage for treatment of infertility problems.

Id. at 678. *See also Castellano v. City of N.Y.*, 142 F.3d 58 (2d Cir. 1998) (it is lawful under the ADA for an employer to offer different levels of retirement benefits to people who retire under different conditions — even though those who retire due to disability receive less than those who retire on the basis of their attainment of years of service), *cert. denied,* 119 S. Ct. 60 (1998); *Lenox v. Healthwise of Ky., Ltd.*, 149 F.3d 453 (employer-sponsored insurance plan that covered some transplants but not heart transplants did not violate the ADA).

Also particularly relevant here is the D.C. Circuit's decision in *Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997). In *Modderno*, the D.C. Circuit rejected the plaintiff's Rehabilitation Act claim that different treatment of mental and physical illnesses in a health benefits plan was unlawful. The court held that such disparities are not "the sort of harm the Rehabilitation Act was intended to redress." *Id.* at 1061. The D.C. Circuit also rejected the contention (which Ford advances here) that the distinction between benefits afforded for physical and mental conditions is "facially discriminat[ory]." *Id.*

These decisions relied, in part, upon this Court's holding in *Traynor v. Turnage*, 485 U.S. 535 (1988), that the Veterans Administration did not violate the Rehabilitation Act by denying extensions of educational benefits to veterans whose disabilities were attributed to their "willful misconduct." This Court explained,

> There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons.

485 U.S. at 549. *See also Alexander v. Choate*, 469 U.S. 287, 287 (1985) (Tennessee's reduction of the number of inpatient days for which Medicaid would pay, which had a disproportionate effect on disabled individuals because of their greater medical needs, did not violate the Rehabilitation Act, which "does not . . . guarantee the handicapped equal results from the provision of state Medicaid. . . .").

Federal agencies charged with the enforcement of the ADA have recognized the same principle. The EEOC, for example, has stated:

> Insurance distinctions that are not based on disability, and that are applied equally to all covered employees, do not discriminate on the basis of disability and so do not violate the ADA. . . . [*A*] *feature of some employer provided health insurance plans is a distinction between the benefits provided for the treatment of physical conditions on the one hand, and the benefits provided for the treatment of 'mental/nervous' conditions on the other. Typically, a lower level of benefits is provided for the treatment of mental/nervous conditions than is provided of the treatment of physical conditions. . . . Such broad*

> ***based distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability.*** **Consequently, although such distinctions may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability and do not violate the ADA.**

EEOC Interim Policy Guidance, June 8, 1993, at 3 (emphasis added), reprinted in EEOC Compliance Manual (BNA) at 70:1052-53.[7]

Because the circuit courts have concluded that a disparity in benefits between mental and physical conditions does not violate the ADA, there is no compelling reason for this Court to grant review.

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7. Similarly, the Senate Labor and Human Resources Committee Report explained:

> [E]mployers may not deny health insurance coverage completely to an individual based on the persons' diagnosis or disability. For example, *while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for mental health coverage*, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition . . . .

S. Rep. No. 116, 101st Cong., 1st Sess., at 29 (1989) (emphasis added).

B. Recent Congressional Enactments Confirm That The ADA Does Not Require Parity Of Benefits For All Conditions.

Further, and compelling, support for the conclusion that the ADA does not require parity of benefits can also be found in more recent Congressional enactments. Particularly relevant is the history of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) ("HIPAA"). The Senate version of the bill would have prohibited an employee health benefit plan from imposing treatment limits on mental health services if similar limits were not imposed on other conditions. S. 1028, 104th Cong., 1st Sess. Amendment No. 3681 (142 Cong. Rec. S. 3670) (Apr. 18, 1996). Prior to passage of the Senate version, Senator Kennedy, one of the original sponsors of both the ADA and HIPAA, explicitly stated that mental illnesses and physical illnesses "are not treated equally under current law." 142 Cong. Rec. S. 3560-61 (Apr. 18, 1996). Similar remarks were made by Senator Wellstone, 142 Cong. Rec. S. 3530 (Apr. 18, 1996), and Senator Domenici, 142 Cong. Rec. S. 9579 (Aug. 2, 1996). Nowhere in the reported debates is there any suggestion that such benefit disparities were already prohibited by the ADA.

The House, moreover, explicitly rejected the "parity" provision in the Senate version of the bill (142 Cong. Rec. H. 6141 (June 11, 1996); *see also* 142 Cong. Rec. H. 9795 (Aug. 1, 1996)), and the law was enacted without any provision requiring parity in the benefits for mental and physical illnesses. The Congressional rejection of a parity requirement makes plain Congress' view that the ADA does not compel parity in benefits for physical and mental conditions, and surely was not meant to clear the way for the courts to do what Congress would not.

That there is no requirement of equal benefits for mental and physical conditions in a long-term disability plan was further confirmed by the enactment of the Mental Health Parity Act of 1996, Pub. L. No. 104-204, Title VII, 110 Stat. 2944 (1996) ("MHPA"), in which Congress amended HIPAA to prohibit certain — but not all — distinctions in benefits between physical and mental conditions in group health insurance plans. Not only does the enactment of MHPA make it perfectly clear that the ADA did not already prohibit such distinctions between benefits provided for mental and physical conditions,[8] MHPA is itself *inapplicable to long-term disability plans*. MHPA, § 702(a), 110 Stat. 2945. The conclusion is therefore inescapable that federal law did not, and still does not, require parity in long-term disability benefits for mental and physical illness.

Thus, the Third Circuit correctly concluded:

> Such congressional action reveals both that the ADA does not contain parity requirements and that no parity requirements for mental and physical disability benefits have been enacted subsequent to the ADA.

(Pet. App., 20a). Likewise, in *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d at 1017-18, and *EEOC v. CNA Ins. Cos.*, 96 F.3d at 1044, the Sixth and Seventh Circuits, respectively, expressly relied on these legislative actions in concluding that the

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8. Members of Congress described the MHPA as the *first step* toward requiring equal health insurance benefits for the mentally disabled. 142 Cong. Rec. H. 10951, *H10957, vol. 142 no. 133 (Sept. 24, 1996); 142 Cong. Rec. H. 10951, *H10961, vol. 142 no. 133 (Sept. 24, 1996); 142 Cong. Rec. S. 11569, *S11569, vol. 142 no. 136 (Sept. 27, 1996).

provision of different long-term disability benefits for physical and mental conditions was not prohibited by the ADA.

Significantly, Petitioner does not mention this *post*-ADA legislative history or discuss this rationale for the Third Circuit's holding that the ADA does not prohibit a disparity in benefits between mental and physical conditions in long-term disability benefit plans. Given this failure and the uniform holdings of the circuit courts regarding disparities in the content of insurance plans, there is no reason for this Court to grant Petitioner's request for review.

C. Title III Requires Equal Access; It Does Not Regulate the Contents of Goods and Services.

ADA Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods [and] services . . . of any place of public accommodation . . . ." 42 U.S.C. § 12182(a). Thus, Title III provides only that disabled persons should have *equal access* to the goods and services provided in places of public accommodation. The language Congress adopted in Title III ensures that disabled persons have the same opportunity as nondisabled persons to "enjoy" those goods and services that generally are offered in places of public accommodation, and not to require any alteration of those goods and services.[9] *See* 42 U.S.C. § 12182(b)(1)(A)(iii). The legislative history of the ADA is replete with statements making clear that Congress's aim in enacting Title III was to provide equal *access* for disabled

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9. Disabled persons are afforded "the right to participate and to have an equal opportunity to obtain the same results as non-disabled individuals. It does not mean that an individual with a disability must achieve an identical result. . . ." H.R. Rep. No. 485, 101st Cong., 2d Sess., at 55 (1990).

persons to the goods and services offered by places of public accommodation. *See* H.R. Rep. No. 485, 101st Cong., 2d Sess., at 35, 71 (1990); *see also* S. Rep. No. 116, 101st Cong., 1st Sess., at 58 (1989).

Thus, while a "place of public accommodation" plainly must take statutorily mandated steps to make its premises, and the goods and services offered therein, accessible to the disabled, it is not required "to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." Department of Justice Regulations, 28 C.F.R. § 36.307(a). The rationale behind this provision is that

> [t]he purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, *not to alter the mix of goods that the public accommodation has typically provided.*

Id. (emphasis added). Examples of special goods *not* required to be provided by a public accommodation include "Brailed versions of books, books on audio-cassettes, closed captioned video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs." *Id.*

Just as the ADA requires a bookstore to guarantee the blind *access* to its books, but does not regulate the *content* of the bookstore's inventory or require the store to offer books on audio tape or in Braille, the ADA does not require MetLife to redesign its insurance products or to create new insurance products to meet the special needs of those persons who in the future will become unable to work by reason of mental or nervous conditions. Thus, even if MetLife can be considered a place of public accommodation in the context of providing a group insurance policy to an employer to fund the employer's

employee benefit plan (which MetLife denies; *see infra* pp. 21-23),[10] Ford received *equal access* to the same benefits provided under MetLife's group policy to all other Schering employees. Accordingly, the Third Circuit correctly held that Ford failed to state a claim of discrimination cognizable under Title III.

II.

NO CONFLICT EXISTS BETWEEN THE FIRST AND THIRD CIRCUITS BECAUSE THE FIRST CIRCUIT HAS NEVER APPLIED THE ADA TO THE CONTENTS OF INSURANCE POLICIES AND DID NOT FIND THAT AN EMPLOYER-SPONSORED BENEFIT PLAN WAS A GOOD OR SERVICE OFFERED BY A PLACE OF PUBLIC ACCOMMODATION.

Petitioner contends that the Third Circuit's holding in this case conflicts with a prior holding of the First Circuit in *Carparts Dist. Ctr., Inc. v. Automotive Wholesalers Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994). No conflict exists, however. *Carparts* simply declined to conclude, at the outset of the litigation, that the plaintiff could never establish that he had been denied access to a place of public accommodation. The First Circuit expressly *refused* to address the question posed by Ford in this case — whether disparities

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10. Numerous courts have held that Title I, not Title III, of the ADA governs employment practices. Pet. App., 25a; *Parker*, 121 F.3d at 1012; *Motzkin v. Trustees of Boston University*, 938 F. Supp. 983, 996 (D. Mass. 1996) ("The legislative intent is so clear from the language of Titles I and III that one need not go beyond that language to conclude that employment discrimination is the exclusive provision of Title I.").

in the *substantive content* of long-term disability plans or policies violated the ADA.[11] Nor did the court express any opinion whether an employer-sponsored benefit plan that, like the Schering LTD Plan, is not offered for sale to any member of the general public, could be considered a good or service offered by a "place of public accommodation" within the meaning of the ADA. The First Circuit simply held that under Title III of the ADA, discrimination by a "place of public accommodation" might not be limited to denial of physical entry to a structure. That question is not presented in this case. Whether Title III prohibits denial of access to a product by other than physical means is not an issue implicated here, where no one was denied a MetLife insurance product at all, at any time or for any reason.

A. The First Circuit Has Not Addressed Disparities in the Content of Insurance Policies, and the Other Circuits Have Uniformly Held, Consistent with Statutory Language and Congressional Intent, that the ADA Only Regulates Access to Goods and Services Offered by a Place of Public Accommodation.

In *Carparts*, an individual (and the company he owned) challenged a lifetime benefit limitation for AIDS-related treatments in a self-funded (*i.e.*, uninsured) medical benefit plan offered by a trade association of which his company was a member, claiming that the limitation constituted employment discrimination or discrimination by a place of public accommodation. The district court dismissed the complaint, holding, *inter alia*, that Title III of the ADA only applied to " 'actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein.' " *Id.* at 18. The First

11. Indeed, *Carparts* concerned a self-funded medical benefits plan; no insurance policy was involved.

Circuit reversed and remanded, holding that the district court had prematurely dismissed the complaint and adopted an overly restrictive definition of a "place of public accommodation." *Id* at 20. The court explicitly declined to address whether the ADA

> is intended merely to provide access to whatever product or service the subject entity may offer, or is intended in addition to shape and control which products and services may be offered.

Id. at 19. Nevertheless, petitioner misleadingly asserts that the First Circuit "did not preclude regulation of the terms and conditions of insurance products under Title III" (Petition, p. 10) and that the Third Circuit's contrary holding thus creates a conflict among the circuits. Petitioner's assertion of a conflict is clearly unfounded.

The First Circuit went to great pains to emphasize that its decision in *Carparts* was extremely narrow and tentative, and did not establish a definitive ruling on the scope of Title III. In the absence of precedents, unable to find definitive answers in the statute or its legislative history, and in light of the need to remand the case for other reasons, the court left open the possibility that the plaintiffs might be able to develop a claim. Beyond this, however, the court refused to go:

> We think that at this stage it is unwise to go beyond the *possibility* that the plaintiff may be able to develop some kind of claim under Title III even though this may be a less promising vehicle in the present case than Title I. Not only the facts, but, as we have already noted, even the factual allegations are quite sparse. In addition, because of our resolution of the Title I claims, this case must be remanded and is subject to further proceedings regardless of whether Title III remains in the case.

Id. at 20 (emphasis added). The First Circuit did not hold that an organization providing a health benefit plan to the employees of its members is a public accommodation; instead, the court remanded the case to the district court to "allow plaintiffs the opportunity to adduce further evidence supporting their view that the defendants are places of 'public accommodation' within the meaning of Title III of the ADA." *Carparts*, 37 F.3d at 19. While the courts in *Ford* and *Carparts* differed over whether a "place of public accommodation" must be physically accessed, this case does not involve denial of access, physical or otherwise. Ford had access to the same LTD Plan as all other Schering employees. Accordingly, Petitioner has failed to present a compelling reason for this Court to grant discretionary review.

B. The Schering LTD Plan and MetLife's Group Policy Were Not Provided by a "Place of Public Accommodation."

Ford's claim must also fail for the entirely independent reason that the disability insurance plan provided by Schering and funded through a MetLife group insurance policy was not offered for sale in or by a "place of public accommodation." Ford did not purchase the group insurance policy from MetLife. Nor could she have done so because MetLife did not offer the group disability policy from any MetLife insurance office which offers goods and services to members of the general public. Rather, the LTD Plan, like other group policies, is sold only to employers. In selling the group policy to Schering, MetLife acted as a wholesaler engaged in a business-to-business transaction.

As the DOJ's regulations make clear, locations in which business is conducted with other businesses — such as wholesale establishments — are not places of public accommodation. Moreover, a wholesale business is not

somehow converted into a place of public accommodation simply because it also has a retail component. "[A] company that operates a place of public accommodation is subject to [Title III] only in the operation of that place." 28 C.F.R. § 36 (App. B) at 604 (1996). As the regulations state:

> [A] company that grows food produce and supplies its crops exclusively to food processing corporations on a wholesale basis does not become a public accommodation because of these transactions. If this company operates a road side stand where its crops are sold to the public, [however], the road side stand would be a sales establishment covered by the ADA. . . . In [this] example . . . , the wholesale produce company that operates a road side stand would be a public accommodation only for the purpose of operation of that stand. The company would be prohibited from discriminating on the basis of disability in the operation of the road side stand, and it would be required to remove barriers to physical access. . . .

Id. If the operation of a retail component could convert a wholesale business into a place of public accommodation, the distinction between "commercial facilities" and "public accommodation[s]," both defined in 42 U.S.C. § 12181, and each subject to very different requirements throughout Title III, would be obliterated.[12] 28 C.F.R. § 36 (App. B) at 604

12. Although Title III extends to goods or services provided by a place of public accommodation through a contractual, licensing or other arrangement, that protection extends no further than the individuals who are "clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." 42 U.S.C. § 12182(b)(1)(A)(iv). Here, Schering purchased the Group Policy for its employees from MetLife. Therefore, Schering, not Ford, is MetLife's "client or customer" who entered into the "contractual arrangement," and Title III still does not apply to Ford's claim.

(1996) ("Of course, a company that operates a place of public accommodation is subject to this part only in the operation of that place of public accommodation.").

The Third Circuit held in this case that because Ford received her disability benefits via her employment at Schering, "she had no nexus to MetLife's 'insurance office' and thus was not discriminated against in connection with a public accommodation." (Pet. App., 26a) Similarly, in *Parker*, a case involving the identical issues and the identical disability benefits plan as the case at bar, the Sixth Circuit, sitting en banc, held that the plaintiff, in receiving coverage under Schering's group disability benefits plan,

> did not seek the goods and services of an insurance office. Rather, [plaintiff] accessed a benefit plan provided by her private employer and issued by MetLife. A benefit plan offered by an employer is not a good offered by a place of public accommodation.

121 F.3d at 1010. This key holding in *Ford* in no way conflicts with the holding in *Carparts*. Petitioner's attempt to manufacture such a conflict must fail. Therefore, there is no compelling reason for this Court to grant discretionary review.

III.

SECTION 501(c) OF THE ADA IS NOT IMPLICATED HERE, SINCE THE METLIFE POLICY AND SCHERING PLAN DO NOT DISCRIMINATE BASED ON DISABILITY AND THE DISPARITIES IN BENEFITS ARE NOT A SUBTERFUGE TO EVADE THE PURPOSE OF THE ADA.

Petitioner urges this Court to address the issue whether Section 501(c) of Title V of the ADA requires an insurance company to present actuarial evidence to support disability-based distinctions in its insurance policies. Contrary to Petitioner's assertions, however, this case does not implicate Title V or the Section 501(c) "safe harbor" provisions because, as previously discussed, there was no discrimination here. All Schering employees were offered the same disability insurance coverage, regardless of their condition. Disabled individuals were not charged a higher rate, denied coverage or provided less coverage than other individuals. Thus, because no disability-based discrimination occurred in this case, interpretation of Section 501(c) is not required.

Moreover, in enacting the ADA, Congress clearly did not intend to intrude into the realm of state regulation of insurance practices. Thus, Section 501(c) mandates that the statute be construed so as not to prohibit or restrict the ability of an employer or insurer to underwrite, classify or administer risks in a way that is based on or not inconsistent with State insurance law, unless a plaintiff can establish that the practice at issue is a "subterfuge" for evading the ADA. This is consistent with the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (emphasis added), which states that

> [n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by

> any State for the purpose of regulating the business of insurance . . . unless such [federal] Act *specifically relates* to the business of insurance.

Petitioner asserts that the Third Circuit misapplied the McCarran-Ferguson Act and that the reference to "Insurance" in the caption of Title V proves that the ADA "specifically relates" to insurance. (Petition, p. 12 n.1, p. 22) However, the express purpose of Title V is to *shield* insurers like MetLife from regulation under Titles I and III. *See* S. Rep. No. 116, 101st Cong., 1st Sess., at 84-85 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., at 136 (1990). As the Third Circuit correctly pointed out, the ADA does not "specifically relate" to the "business of insurance;" the statute "does not mention the term 'insurance' in its introductory section entitled 'Findings and purpose[.]' " (Pet. App., 24a) Indeed, the only reference to "insurance" in Title III is to include "insurance office" in a list of places of public accommodation. 42 U.S.C. § 12181. The mere mention of "insurance office" evidences no intent to regulate the business of insurance or the contents of insurance policies. *See also Leonard F. v. Israel Discount Bank*, 967 F. Supp. 802, 805 (S.D.N.Y. 1997) ("Congress meant to protect providers [of] insurance and their practice of providing different levels of benefits for individuals with physical and mental conditions (as a risk classification practice). The ADA does not, nor was it ever intended to regulate the business of insurance and for that reason it includes an explicit 'Safe Harbor' provision shielding traditional insurance risk classification practices from regulation under the ADA.") Thus, it is clear that the purpose of Section 501(c) is to emphasize that regulation of the terms of insurance policies should remain a state law matter as mandated by the McCarran-Ferguson Act.

Furthermore, the *Ford* court properly held that, consistent with this Court's precedent, the "subterfuge" term in Section

501(c) does not require an insurer to actuarialy justify its policy provisions. The court declined to "construe section 501(c) to require a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff." (Pet. App., 24a).

In *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), this Court interpreted a similar "subterfuge" provision in the ADEA[13] and specifically rejected the contention that a disparity in employee benefits not justified by actuarial cost data was a subterfuge. Since Congress used the same "subterfuge" language when it enacted section 501(c) of the ADA in 1990, after the *Betts* decision, it is presumed to have intended the phrase to be accorded the same meaning as in *Betts*. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

In following this Court's interpretation of "subterfuge", the Third Circuit agreed with the other circuits which reached the same conclusion. In *Modderno v. King*, 82 F.3d at 1064, the D.C. Circuit relied on the Supreme Court's definition of the term "subterfuge" as set forth in *Betts* and held that a $75,000 lifetime coverage limit for mental health benefits under a benefits plan was not a "subterfuge" to evade the purposes of the ADA. The court rejected the EEOC's position that an employer must provide a cost or risk-based justification for distinguishing between mental and physical disabilities in order to avoid a finding of subterfuge. *Id.* Similarly, the Eighth Circuit in *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d at 678-79, applied the *Betts* definition and held a

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13. The ADEA (prior to its amendment in 1990) had the same three part structure as the ADA: (1) it broadly prohibited age discrimination in employment contexts; (2) it provided a "safe harbor" for any bona fide employee benefit plan; and (3) it contained the clause "so long as they are not a subterfuge to avoid the purposes of [the ADEA]." ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1986).

health insurance plan was not required to present an actuarial justification for excluding fertility treatment coverage.

Petitioner's attempts to distinguish *Betts* are unpersuasive. Despite Petitioner's mischaracterization, the *Betts* Court did not rely simply on the plan's creation prior to the enactment of the ADEA as a basis for finding it was not a subterfuge for discrimination (Petition, p. 27); rather, the Court also analyzed whether, applying *Betts*, the plan discriminated in "other, non-fringe-benefit aspects of the employment relationship." 492 U.S. at 177. The Court reasoned that although the ADEA's definition of discrimination could encompass employee benefit plans, the exemption indicated a legislative intent to exclude such plans from the statute so long as they were not used as a device to discriminate in other aspects of the employment relationship. *See id.*

Thus, as Judge Alito noted in his concurring opinion, under *Betts*, to establish subterfuge Ford must show that the Schering Plan was "intended to serve the purpose of discriminating in some non-insurance-benefit aspect of her relationship with the defendants." Ford's complaint, Judge Alito continued, contains no such allegation. (Pet. App., 34a).

Further, although the ADA Section 102(b)(2) definition of "discriminate" includes participating in a contractual relationship with "an organization providing fringe benefits" that subjects a disabled individual to the discrimination prohibited by the ADA, the Section 501(c) exemption indicates a legislative intent to exclude bona fide benefit plans from regulation so long as they are not used as a device to discriminate in other non-fringe benefit aspects of the employment relationship. Indeed, in *Piquard v. City of East Peoria*, 887 F. Supp. 1106 (C.D. Ill. 1995), which Petitioner cites and quotes at length (Petition, pp. 25-26), the Central

District of Illinois adopted this construction of Section 501(c) and *applied* the *Betts* construction of subterfuge to a disability-based distinction in a pension plan. 887 F. Supp. at 1124-26. In doing so, the court expressly rejected the EEOC Interim Guidance on which Petitioner relies in an attempt to distinguish *Betts* (Petition, p. 28) on the ground that the Guidance was contrary to the plain language of the statute and legislative intent. *See id.*

Thus, because this case does not implicate Section 501(c), and the Third Circuit's interpretation of that section is consistent with this Court's precedent and the holdings of the other circuit courts, there is no reason to grant discretionary review.

CONCLUSION

Because the questions Petitioner raises do not present a compelling reason for review, the Petition should be denied.

Respectfully submitted,

ALLAN M. MARCUS
Counsel of Record
One Madison Avenue
New York, NY 10010-3690
(212) 578-3722

ALLEN I. FAGIN
RONALD S. RAUCHBERG
AARON J. SCHINDEL
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

Attorneys for Respondent
Metropolitan Life Insurance Company

APPENDIX

APPENDIX A — STATEMENT PURSUANT TO RULE 29.6

Respondent Metropolitan Life Insurance Company has no parent company, but has the following affiliates and subsidiaries, other than wholly-owned subsidiaries:

AEW Advisors, Inc.
AEW Capital Management, Inc.
AEW Capital Management, L.P.
AEW Hotel Investment Corporation
AEW Hotel Investment Limited Partnership
AEW Investment Group Inc.
AEW Management and Advisors, L.P.
AEW Real Estate Advisors, Inc.
AEW Real Estate Advisors, Limited Partnership
AEW Securities, L.P.
Aldrich Eastman Global Investment Strategies, LLC
Aurora Limited Partnership
Back Bay Advisors, Inc.
Back Bay Advisors, L.P.
BBC Investment Advisors, Inc.
BBC Investment Advisors, L.P.
BCOP Associates L.P.
Capital Growth Management Limited Partnership
Chart House Enterprises, Inc.
Coating Technologies International, Inc.
Copley Properties Company, Inc.
Copley Properties Company II, Inc.
Copley Properties Company III, Inc.
Copley Public Partnership Holding, L.P.
CREA Investors/Santa Fe Springs, Inc.
CREA Western Investors I, Inc.
CREA Western Investors I, L.P.
Dan River, Inc.
Eclipse Claim Services Inc.

Appendix A

Eighth Copley Corp.
Fifth Copley Corp.
Fifth Singleton Corp.
First Income Corp.
Fourth Copley Corp.
Fourth Income Corp.
Fourth Singleton Corp.
Genesis Seguros Generales, Sociedad Anonima de Seguros y Reaseguros
Graystone Partners, Inc.
Graystone Partners, L.P.
Harris Associates, Inc.
Harris Associates, L.P.
Harris Associates Securities, L.P.
Harris Partners, Inc.
Harris Partners L.L.C.
Interbroker, Correduria de Reaseguros, S.A.
Jurika & Voyles, Inc.
Jurika & Voyles, L.P.
Lone Star Industries, Inc.
Loomis, Sayles & Company, Inc.
Loomis Sayles & Company, L.P.
Loomis Sayles Distributors, Inc.
Loomis Sayles Distributors, L.P.
Luther's Bar-b-q, Inc.
MC Management, Inc.
MC Management, L.P.
Mecca Software, L.L.C.
Mercadian Capital L.P.
Mercadian Funding L.P.
Met Life International Real Estate Equity Shares, Inc.
Metric Colorado, Inc.
Metric Institutional Apartment Fund II, L.P.

Appendix A

Metropolitan Lloyds Insurance Company of Texas
Metropolitan Structures
Morguard Investments Limited
Nailite International, Inc.
Nef Corporation
New England Investment Companies, L.P.
New England Funds, L.P.
New England Funds Management, L.P.
New England Funds Service Corporation
Nvest, L.P.
Nvest Associates, Inc.
Nvest Companies, L.P.
Nvest Holdings, Inc.
Nvest Partnerships, LLC
Perseus Partners L.P.
Pesco Plus, L.C.
Pleiades Partners, L.P.
P.T. Metlife Sejahtera
Public Employees Equities Services Company
R&T Asset Management, Inc.
Reich & Tang Asset Management, L.P.
Reich & Tang Distributors, Inc.
Reich & Tang Services, Inc.
Santander Met, S.A.
Second Income Corp.
Seguros Genesis, S.A. (Spain)
Seventh Copley Corp.
Seguros Genesis, S.A. de C.V.
Sixth Copley Corp.
Sixth Singleton Corp.
Snyder Capital Management, Inc.
Snyder Capital Management, L.P.
Spa Partners, L.P.

Appendix A

State Street Research Intermediate Bond Fund
State Street Research International Fixed Income Fund
State Street Research Strategic Portfolios: Aggressive
State Street Research Strategic Portfolios: Conservative
State Street Research Strategic Portfolios: Moderate
Stella Partners, L.P.
Third Income Corporation
Third Singleton Corporation
Vaughan, Nelson, Scarborough & Mcullough, Inc.
Vaughan, Nelson, Scarborough & Mccullough, L.P.
VNSM Trust Company
Westpeak Investment Advisors, Inc.
Westpeak Investment Advisors, L.P.
Westpeak Investment Advisors Australia Limited Pty.

Supreme Court, U.S.
FILED
JAN 6 1999
OFFICE OF THE CLERK

No. 98-529

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1999

COLLEEN V. FORD,

Petitioner,

v.

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

BRIAN J. MOLLOY, ESQUIRE
Counsel of Record
MAUREEN S. BINETTI, ESQUIRE
CHRISTOPHER W. HAGER, ESQUIRE
WILENTZ GOLDMAN & SPITZER
90 Woodbridge Center Drive
Suite 900 Box 10
Woodbridge, NJ 07095-0958
(732) 636-8000
Attorneys for Petitioner

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Winslow v. IDS Life Ins. Co.,
1998 WL 852876 (D. Minn. September 30, 1998) 2, 3, 4

PRELIMINARY STATEMENT

Petitioner, Colleen V. Ford, respectfully submits this supplemental brief pursuant to U.S. Supreme Court Rule 15 to bring to this Honorable Court's attention two recent U.S. District Court cases that support petitioner's reasoned interpretation of the ADA, and stand in contrast to the decision by the Third Circuit below.

POINT I

RECENT DISTRICT COURT CASE LAW CONSTRUING TITLE III OF THE ADA TO PROHIBIT DISCRIMINATION IN THE CONTENTS OF INSURANCE POLICIES IS ENTIRELY CONSISTENT WITH THE ADA'S INTENT

Two recent district court decisions supplement Petitioner's arguments, contained in pages four through fourteen of her petition for a writ of certiorari, that the remedial intent of Title III of the ADA applies to insurance policies.

In Doe v. Mutual of Omaha Ins. Co., 999 F. Supp. 1188, 1194 (N.D. Ill. 1998), the court joined "a growing number of district courts across the nation that have found Title III's scope to encompass review of the substance of insurance policies." (See Exhibit A). In doing so, the court rejected the Parker en banc majority's narrow interpretation of Title III as such a construction belies the statute's plain language. See id. at 1192-93. The court reasoned that this plain language, read together with the relevant ADA legislative history and DOJ

interpretive guidance, clearly supported the conclusion that Title III of the ADA cannot be restricted to the physical access of a building, but may properly be construed to apply to the content of defendant's insurance policies. Id. at 1194.

Similarly, Winslow v. IDS Life Ins. Co., 1998 WL 852876 at *6, (D. Minn. September 30, 1998), the court held that Title III was "applicable to [long-term disability] insurance policies and not limited to access to actual physical structures," basing its decision on "the legislative history, the DOJ interpretation of Title III of the ADA and the reasoning adopted by a growing number of district courts." (See Exhibit B). The court took special note of the fact that the ADA's statutory language relating to the enjoyment of goods and services would be rendered irrelevant if Title III were held to apply only to physically accessing public accommodations, or structures. See Id. at *5.

Both Doe and Winslow demonstrate that Parker, as followed by the Third Circuit below, stands for principles contrary to those which the ADA seeks to advance. Indeed, Winslow points out the unmistakable split between Parker's construction, and that which was followed by the First Circuit in Carparts. Due to this split in the circuits, together with the growing number of district courts that flatly reject the Parker en banc majority holding, (and, therefore, the Third

Circuit's decision below) this Honorable Court is presented with the opportunity to address these ADA issues in order to settle the law in this increasingly litigated area of controversy.

POINT II

RECENT DISTRICT COURT CASE LAW CONFIRMS THAT THE ADA APPLIES TO THE INSURANCE INDUSTRY, AND THAT AN INSURER MUST JUSTIFY ANY DISABILITY-BASED INSURANCE DISTINCTION WITH COMPETENT EVIDENCE

Supplementing Petitioner's arguments in pages twenty-one through twenty-nine of her petition for a writ of certiorari, both Doe and Winslow held that the ADA specifically relates to the insurance industry, and that any disability-based insurance policy distinction must be justified through sound actuarial principles, reasonably anticipated experience, or bona fide risk classifications. See 999 F. Supp. at 1195; 1998 WL 852876 at *9.

In Doe, the court rejected the defendant insurance company's argument that Congress intended to broadly exempt insurance companies from the reach of the ADA, finding that § 5.01(c)'s safe harbor provision manifested the contrary intent to subject insurance companies to the full scope of the ADA's anti-discrimination prohibitions. See 999 F. Supp. at 1195. The court stated that the defendant insurance company could prove its compliance with the ADA by demonstrating that caps placed on AIDS and AIDS-related conditions in plaintiff's

policies "were consistent with sound actuarial principles, reasonably anticipated experience, or bona fide risk classification." Id. Likewise, the court in Winslow stressed the importance of insurance companies justifying any disability-based distinction in their policies, holding that summary judgment was inappropriate and that a genuine issue of material fact existed as to whether defendant's insurance policy, which denied coverage to employees on the basis of mental disability, conformed to sound actuarial principles, claims experience, or substantial data as required under Minnesota law. See id. at *9.

The well reasoned conclusions of these district courts, as well as the authority cited therein, illustrates the effect of the Third Circuit's decision in this case to effectively insulate insurer's discriminatory practices from the reach of the ADA. In light of these common sense applications of the ADA's provisions to dubious insurance industry distinctions, petitioner respectfully requests that this Honorable Court grant her petition, reverse the Third Circuit, and remand this case with instructions that defendant MetLife justify its long-term disability insurance distinction between mental and physical disabilities with competent evidence.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in her petition, Petitioner Colleen V. Ford respectfully requests that this Court grant her petition for a Writ of Certiorari.

Respectfully submitted,

BRIAN J. MOLLOY, ESQUIRE
Counsel of Record
MAUREEN S. BINETTI, ESQUIRE
CHRISTOPHER W. HAGER, ESQUIRE
WILENTZ GOLDMAN & SPITZER, P.A.
90 Woodbridge Center Drive
Suite 900 Box 10
Woodbridge, NJ 07095-0958
(732) 636-8000
Attorneys for Petitioner

DATED: January 6, 1999

John DOE and Richard Smith, Plaintiffs,
v.
MUTUAL OF OMAHA INSURANCE COMPANY, Defendant.

No. 98 C 0325.

United States District Court,
N.D. Illinois,
Eastern Division.

April 3, 1998.

Insureds sued medical insurer for violations of Americans with Disabilities Act and state law in capping medical insurance policy benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC). On insurer's motion to dismiss, the District Court, Conlon, J., held that: (1) prohibition against disability discrimination in places of public accommodation under ADA applied to medical insurer's issuance to individuals of policies capping benefits for medical care of AIDS or ARC; (2) McCarran-Ferguson Act's antipreemption rule did not preclude application to insurance policies of prohibition against disability discrimination in places of public accommodation under ADA; (3) allegations of differential treatment under medical insurance policy provisions capping benefits for medical care of AIDS or ARC stated a cognizable claim of discrimination; and (4) private right of action would not be implied under state statute prohibiting disability discrimination in accident or health insurance policies.

Motion granted in part and denied in part.

[1] CIVIL RIGHTS ⚭119.1
78k119.1
Prohibition against disability discrimination in places of public accommodation under Americans with Disabilities Act (ADA) is concerned with more than equal access to goods and services, and it covers the discriminatory denial of an opportunity to benefit from or enjoy equally the goods and services of a public accommodation. Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[2] CIVIL RIGHTS ⚭119.1
78k119.1
Prohibition against disability discrimination in places of public accommodation under Americans with Disabilities Act (ADA) applied to a medical insurer's issuance to individuals of medical insurance policies capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[2] INSURANCE ⚭1523
217k1523
Prohibition against disability discrimination in places of public accommodation under Americans with Disabilities Act (ADA) applied to a medical insurer's issuance to individuals of medical insurance policies capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[2] INSURANCE ⚭2522
217k2522
Prohibition against disability discrimination in places of public accommodation under Americans with Disabilities Act (ADA) applied to a medical insurer's issuance to individuals of medical insurance policies capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[3] STATUTES ⚭219(6.1)
361k219(6.1)
Statutory interpretation in Department of Justice's Americans with Disabilities Act Title III Technical Assistance Manual must be given deference, unless interpretation is arbitrary, capricious, or clearly contrary to the statute. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[4] CIVIL RIGHTS ⚭119.1
78k119.1
Americans with Disabilities Act (ADA) provides insurers with "safe harbor" exemption from public accommodations provisions of ADA so long as their underwriting decisions or risk classification accord with sound actuarial principles, reasonably

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anticipated experience, or bona fide risk classification, and do not otherwise constitute a subterfuge to evade the purposes of the ADA. Americans with Disabilities Act of 1990, § 501(c), 42 U.S.C.A. § 12201(c).

[4] INSURANCE ⚖1518
217k1518
Americans with Disabilities Act (ADA) provides insurers with "safe harbor" exemption from public accommodations provisions of ADA so long as their underwriting decisions or risk classification accord with sound actuarial principles, reasonably anticipated experience, or bona fide risk classification, and do not otherwise constitute a subterfuge to evade the purposes of the ADA. Americans with Disabilities Act of 1990, § 501(c), 42 U.S.C.A. § 12201(c).

[5] INSURANCE ⚖1109
217k1109
McCarran-Ferguson Act's antipreemption rule, which generally prohibits federal statutes from preempting state insurance laws, did not preclude application to insurance policies of prohibition against disability discrimination in places of public accommodation under Title III of Americans with Disabilities Act (ADA); insurers' "safe harbor" exemption from ADA's public accommodations provisions specifically related to the business of insurance within meaning of exception to antipreemption rule, and there was no conflict between ADA and state statute, which likewise prohibited disability discrimination in insurance policies. Americans with Disabilities Act of 1990, § § 302(a), 501(c), 42 U.S.C.A. §§ 12182(a), 12201(c); McCarran-Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b); S.H.A. 215 ILCS 5/364.

[5] STATES ⚖18.41
360k18.41
McCarran-Ferguson Act's antipreemption rule, which generally prohibits federal statutes from preempting state insurance laws, did not preclude application to insurance policies of prohibition against disability discrimination in places of public accommodation under Title III of Americans with Disabilities Act (ADA); insurers' "safe harbor" exemption from ADA's public accommodations provisions specifically related to the business of insurance within meaning of exception to antipreemption rule, and there was no conflict between ADA and state statute, which likewise prohibited disability discrimination in insurance policies. Americans with Disabilities Act of 1990, § § 302(a), 501(c), 42 U.S.C.A. §§ 12182(a), 12201(c); McCarran-Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b); S.H.A. 215 ILCS 5/364.

[6] CIVIL RIGHTS ⚖118
78k118
Insureds' allegations of differential treatment under medical insurance policy provisions capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC) stated a cognizable claim of discrimination in violation of Title III of the Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[6] INSURANCE ⚖1523
217k1523
Insureds' allegations of differential treatment under medical insurance policy provisions capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC) stated a cognizable claim of discrimination in violation of Title III of the Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[6] INSURANCE ⚖2522
217k2522
Insureds' allegations of differential treatment under medical insurance policy provisions capping benefits for medical care of Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC) stated a cognizable claim of discrimination in violation of Title III of the Americans with Disabilities Act (ADA). Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

[7] INSURANCE ⚖3540
217k3540
Private right of action would not be implied under state statute prohibiting disability discrimination in accident or health insurance policies; primary concern of statute was direct regulation of insurance industry, and creation of right of action would not be necessary to effectuate statutory purposes. S.H.A. 215 ILCS 5/364.

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***1190** Stuart Irwin Graff, Schiff, Hardin & Waite, Chicago, IL, Ann H. Fisher, AIDS Legal Council of Chicago, Chicago, IL, Heather Chase Sawyer, Lambda Legal Defense & Education Fund, Inc., Chicago, IL, for Plaintiffs.

Joel H. Kaplan, Thomas James Piskorski, Cassandra L. Curry, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, IL, for Defendants.

Scott R. Lassar, U.S. Attorney, Northern District of Illinois, Joan Laser, Assistant U.S. Attorney, Northern District of Illinois, Chicago, IL, Bill Lann Lee, Acting Assistant Attorney, General Civil Rights Division, John L. Wodatch, L. Irene Bowen, Philip L. Breen, Alyse S. Bass, Civil Rights Division, Washington, DC, for U.S. as Amicus Curiae.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

John Doe ("Doe") and Richard Smith ("Smith") ("plaintiffs") bring a two count complaint against Mutual of Omaha Insurance Company ("Mutual"). [FN1] The claims arise from plaintiffs' purchase of individual health insurance policies from Mutual. Count I alleges disability discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq. Count II alleges a violation of Section 364 of the Illinois Insurance Code ("IIC"), 215 ILCS 5/364. Mutual moves to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiffs filed a timely response. The Department of Justice ("DOJ") also filed a response brief for the United States as amicus curiae.

> FN1. In order to protect plaintiffs' privacy, the court granted leave to proceed anonymously under the fictitious names "John Doe" and "Richard Smith." See Order, No. 98 C 0325 (N.D.Ill. Feb.19, 1998).

BACKGROUND

For purposes of a motion to dismiss, the court accepts all well-pleaded allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. Travel All Over The World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1429 (7th Cir.1996). Plaintiffs are Chicago residents infected with the human immunodeficiency virus ("HIV"). Mutual is a Nebraska corporation with its principal place of business in Omaha, Nebraska. Mutual offers and sells its insurance directly to members of the public at various office locations.

Both Doe and Smith hold Mutual health insurance policies that place significant limits on the amount of benefits available to individuals suffering from Acquired Immune Deficiency Syndrome (AIDS) or AIDS Related Conditions (ARC) ("AIDS/ARC caps"). Doe's policy limits recoverable benefits to a lifetime maximum of $100,000. Smith's policy limits recoverable benefits to a lifetime maximum of $25,000. By contrast, each policy provides benefits for other medical care up to a lifetime maximum of $1,000,000. In addition, for medical conditions other than AIDS and ARC, Mutual will reinstate the million dollar maximum benefit and pay additional claims on the policy after the limit is reached, provided the insured does not incur any expenses for two consecutive calendar years.

Plaintiffs allege a number of ways the AIDS/ARC caps impact their ability to obtain continued medical care. According to medical guidelines published by the National Institutes of Health, HIV infection is best treated through early medical intervention, including antiretroviral therapies and related care aimed at reducing the levels of HIV in the body. Because Mutual considers expenses related to any treatment or care for HIV infection as part of the insured's lifetime maximum benefit for AIDS or ARC, the benefits caps adversely affect plaintiffs' ability to obtain the recommended medical care, including the initiation and continuation of antiretroviral therapies and related treatment. In particular, the AIDS/ARC caps ***1191** place plaintiffs at substantial risk of exhausting their coverage in the near future. Once plaintiffs have reached the policy limits, they will be left without insurance benefits for all medical treatment related to AIDS or ARC. Thus, the policy caps not only impair the plaintiffs' ability to make treatment decisions, but pose the risk of jeopardizing plaintiffs' health by forcing an untimely interruption in medical treatment.

In Count I, plaintiffs allege that Mutual's policy caps on AIDS and ARC benefits violate the ADA's prohibition against discrimination on the basis of a disability because they deny plaintiffs the opportunity to participate in and benefit from the

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$1,000,000 lifetime maximum and potential reinstatement of benefits provided to insureds with other medical conditions. Count II alleges a violation of Section 364 of the IIC based on Mutual's inability to support its coverage distinctions with reference to sound actuarial principles and actual experience. 215 ILCS 5/364. Mutual moves to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6).

DISCUSSION

I. Motion to Dismiss Standards

In ruling on a motion to dismiss, the court considers "whether relief is possible under any set of facts that could be established consistent with the allegations." Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir.1992) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). A claim may be dismissed only if it is beyond doubt that under no set of facts would a plaintiff's allegations entitle him to relief. Travel All Over The World, Inc., 73 F.3d at 1429 (7th Cir.1996); Venture Associates Corp. v. Zenith Data Systems Corp., 987 F.2d 429, 432 (7th Cir.1993) (citing Beam v. IPCO Corp., 838 F.2d 242, 244 (7th Cir.1988)). The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide its merits. Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir.1990).

II. Scope of Title III of the ADA

This case presents a novel threshold issue of statutory interpretation under Title III of the ADA. [FN2] The issue is whether Title III's prohibition against unlawful discrimination extends to the content of insurance policies offered directly through an insurer. Title III's general anti-discrimination provision is found in § 302(a) of the ADA. 42 U.S.C. § 12182(a). The provision reads:

> No individual shall be discriminated against based on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). [FN3] In Mutual's view, the plain language of this provision dictates that Title III regulates only access to goods and services offered by places of public accommodation, as opposed to the content of the goods and services themselves. According to Mutual's interpretation, since plaintiffs indisputably enjoyed equal access to the same health insurance policies available to any other individual (disabled or non-disabled) their ADA claim fails as a matter of law.

FN2. For purposes of this motion, Mutual assumes asymptomatic HIV positive status constitutes a disability as defined by the ADA. Mutual notes, however, that appellate courts are divided on this issue. Compare Runnebaum v. NationsBank of Maryland, 123 F.3d 156 (4th Cir.1997) with Abbott v. Bragdon, 107 F.3d 934 (1st Cir.1997), cert. granted, --- U.S. ----, 118 S.Ct. 554, 139 L.Ed.2d 396 (1997). This issue is therefore not properly before the court.

FN3. "Insurance offices" are included in Title III's list of "private entities that are considered public accommodations." 42 U.S.C. § 12181(7)(F).

Plaintiffs offer an alternative interpretation of the plain language of § 302(a) of the ADA and of the intended scope of Title III. Plaintiffs assert that Mutual's restrictive reading of the statutory text would render meaningless § 302(a)'s requirement that persons with disabilities be accorded "full and equal enjoyment" of facilities, goods, services, privileges, or advantages of public accommodations. Limiting the reach of § 302(a) to denials of access, as Mutual suggests, misreads the text because one can only enjoy something after gaining access. Plaintiffs find additional support for this broad interpretation of Title III in the text of § 302(b). The subsection states, in relevant part:

> ***1192** It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class ... with the opportunity to participate in or benefit from a good, service, facility, privilege or advantage, or accommodation that is not equal to that afforded to other individuals.

42 U.S.C. § 12182(b)(1)(A)(ii). In plaintiffs' view, the text of this subsection confirms that Title III of the ADA is concerned with more than just equal access. Instead, Title III of the ADA reaches the discriminatory denial of an opportunity to benefit from or enjoy equally the goods and services of a public accommodation. [FN4]

FN4. The DOJ shares plaintiffs' interpretation of

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the reach of Title III.

Mutual relies on Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir.1997) (en banc), cert. denied, --- U.S. ----, 118 S.Ct. 871, 139 L.Ed.2d 768 (1998) and Leonard F. v. Israel Discount Bank of New York, 967 F.Supp. 802 (S.D.N.Y.1997) as authority for its narrow interpretation of Title III's scope. In Parker, an en banc panel of the Sixth Circuit addressed whether Title III of the ADA prohibits an employer from providing a long term disability plan that distinguishes between mental and physical disorders in the amount of available benefits. The long term disability plan was challenged as discriminatory because it provided substantially lesser benefits to individuals suffering from mental disabilities, than it did to individuals suffering from physical disabilities. The Sixth Circuit held that "the provision of a long- term disability plan by an employer and administered by an employer and administered by an insurance company does not fall within the purview of Title III [of the ADA]." 121 F.3d at 1014. In arriving at this holding, the Sixth Circuit stated "[t]he applicable regulations clearly set forth that Title III regulates the availability of the goods and services the place of public accommodation offers as opposed to the contents of the goods and services offered by the public accommodation." Id. at 1012. Mutual argues this language supports its restrictive reading of Title III's statutory scope.

The district court in Leonard F. addressed a nearly identical ADA challenge to that addressed in Parker. Plaintiff argued that the two year limitation for mental disorders provided by his employer's disability insurance plan was discriminatory. The first section of the court's opinion concluded that plaintiff could not state a discrimination claim against his employer under Title III of the ADA. In reaching this conclusion, the court disapproved of plaintiff's argument, in reliance on the First Circuit's decision in Carparts Distribution Center v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12, 17-18 (1st Cir.1994), that Title III applies to "more than mere places, in the sense of physical structures." Id. at 804. The district court rejected the First Circuit's ruling because "[this] decision, which is not binding precedent in this Court, is essentially dictum which flies in the face of the plain meaning of Title III and is not supported by the legislative history." Id. Mutual asserts the above-quoted language supports its argument that Title III does not cover the content of insurance policies.

In contrast, plaintiffs find support for their broader interpretation of the scope of Title III in Chabner v. United of Omaha Life Ins. Co., 994 F.Supp. 1185 (N.D.Cal.1998) and World Ins. Co. v. Branch, 966 F.Supp. 1203 (N.D.Ga.1997). In Chabner, a plaintiff who suffered from physical disabilities sued an insurer under various state statutes and Title III of the ADA. Plaintiff alleged discrimination under the ADA because the cost of his whole life insurance policy was nearly double the rate charged to non-disabled individuals during the same period of time. At the outset of its opinion on the insurer's motion for summary judgment, the court directly addressed whether Title III applies to insurance underwriting practices. The insurer argued that the scope of Title III of the ADA covers only discrimination in the physical access to goods and services. The court rejected this argument and held that the plain language of Title III and relevant legislative history supported its application to insurance underwriting practices. 994 F.Supp. at 1188-93. Otherwise, the court reasoned, Title III's prohibitions providing for equal access to goods and services, 42 U.S.C. § 12182(b)(1)(A)(ii), and requiring "reasonable *1193 modifications in policies, practices or procedures ... necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities" would be rendered superfluous, 42 U.S.C. § 12182(b)(1)(A)(ii). Id. at 1190.

The district court in World Insurance Company addressed the applicability of Title III to an insurance policy provision, like the Mutual policies at issue here, that caps lifetime coverage for AIDS treatment. 966 F.Supp. at 1207. The court first surveyed district court cases applying Title III to the content of insurance policies in related contexts. The court then examined the legislative history of the ADA. Finally, the court concluded that Title III applied to the insurer's decision to limit the maximum benefit for AIDS related treatment to $5,000. Id. at 1208-09.

[1] This court finds the Parker and Leonard F. courts' limitation on the scope of Article III neither controlling nor persuasive. Contrary to Mutual's suggestion, limitation of Title III's scope to the question of discriminatory access is at odds with the

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plain language of Title III, relevant legislative history and the Department of Justice's interpretative guidance. As an initial matter, the plain language of Title III's anti-discrimination provisions nowhere indicates that Title III's scope is limited to questions of access. Indeed, in order to arrive at the restrictive interpretation of Title III that Mutual advances, the Parker court relied on the language of the ADA regulations. The Parker court did not comment on the statutory text. The plain language of 42 U.S.C. § 12182(a), (b)(1)(A)(i), (b)(1)(A)(ii) and (b)(1)(A)(iii) belies the Parker court's narrow conclusion. Title III is patently concerned with more than just access to the goods and services offered by places of public accommodation. Rather, the plain language of Title III manifests a Congressional intent to ensure "full and equal enjoyment" of the goods and services themselves and an equal opportunity to "participate in or benefit from" goods or services offered by a place of public accommodation. 42 U.S.C. § 12182(a), (b)(1)(A)(ii); see Doukas v. Metropolitan Life Ins. Co., 950 F.Supp. 422, 426 (D.N.H.1996) ("The broad wording and diversity of [§ 12182's] 'specific prohibitions,' are a strong indication that Title III was intended to extend beyond mere access or availability of a good or service.").

[2] Applying these provisions, Mutual's insurance policy is plainly one of the "goods, services, ... privileges [or] advantages" offered by an insurance office. See Doukas, 950 F.Supp. at 426. It follows that, Mutual's policy caps for AIDS and ARC could plausibly constitute discrimination under any one of Title III's specific prohibitions. The AIDS/ARC caps could alternately be viewed as a discriminatory denial of the "full and equal enjoyment" of goods or a service; as a discriminatory denial of an equal opportunity to benefit from goods or a service; as the discriminatory denial of an opportunity to benefit from goods or a service; or as the provision of goods or a service different from that provided to others. § 12182(a), (b)(1)(A)(i), (b)(1)(A)(ii), (b)(1)(A)(iii). To limit the scope of Title III to denials of access would effectively render the statutory language meaningless. See Chabner, 994 F.Supp. at 1190. Thus, to give full effect to Title III's plain language, it must be deemed applicable to the content of insurance policies.

The legislative history of the ADA also confirms the applicability of Title III to the substance of insurance policies. In particular, the text of both House and Senate reports acknowledges the applicability of the ADA's anti- discrimination provisions to insurance policies. For example, one House report states, in pertinent part:

> [W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under [Section 501(c)], the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

H.R.Rep. No. 101-485, pt. 2, at 136-37 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 419-20. Similarly, the Senate report stated:

> ***1194** virtually all states prohibit unfair discrimination among persons of the same class and equal expectation of life. The [ADA] adopts this prohibition of discrimination. Under the [ADA], a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

S. Rep. No. 101-116 at 84 (1989). Thus, the legislative history illustrates that Congress contemplated application of the ADA to insurance policies. [FN5]

> FN5. Other district courts have relied on similar sections of the ADA's legislative history to support the application of Title III to insurance policies. See, e.g., Chabner, at 1190; World Insurance, 966 F.Supp. at 1208.

[3] Finally, the DOJ's interpretative guidance provides persuasive support for the conclusion that Title III applies to the content of insurance policies. The DOJ's interpretations of Title III are expressed in both the regulations and the technical assistance manual. [FN6] For example, the DOJ has concluded that the ADA "reach[es] insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified." 28 C.F.R. ch.1, pt. 36, App. B at 619 (1996). Similarly, the DOJ's technical assistance manual states:

> FN6. Congress has delegated to the DOJ the

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authority to promulgate binding regulations, 42 U.S.C. § 12186(b), and to issue a technical assistance manual providing guidance about the ADA's requirements, 42 U.S.C. § 12206(c)(3). In view of this express delegation of authority, the DOJ's regulations must be given "legislative and hence controlling weight, unless they are arbitrary, capricious, or clearly contrary to the statute." United States v. Morton, 467 U.S. 822, 834, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984). The technical assistance manual is entitled to similar deference. See, e.g., Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 45 n. 8 (2d Cir.1997).

> Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer.

Title III Technical Assistance Manual § III-3.11000 (Nov.1993). Thus, the DOJ has consistently interpreted Title III as applicable to insurance policies.

In summary, Title III of the ADA applies to the content of Mutual's insurance policies. In reaching this conclusion, this court joins a growing number of district courts across the nation that have found Title III's scope to encompass review of the substance of insurance policies. See, e.g., Chabner, 994 F.Supp. at 1190; Lewis v. Aetna Life Ins. Co., 982 F.Supp. 1158, 1163-65 (E.D.Va.1997); World Insurance Co., 966 F.Supp. at 1207-08; Cloutier v. Prudential Ins. Co., 964 F.Supp. 299, 301-02 (N.D.Cal.1997); Doukas, 950 F.Supp. at 425-26; Kotev v. First Colony Life Ins. Co., 927 F.Supp. 1316, 1321-22 (C.D.Cal.1996); Anderson v. Gus Mayer Boston Store of Delaware, 924 F.Supp. 763, 779 (E.D.Tex.1996); Baker v. Hartford Life Ins. Co., No. 94 C 4416, 1995 WL 573430, *3 (N.D.Ill. Sept.28, 1995). The contrary conclusion Mutual urges would undermine the plain language of Title III, and disregards legislative history as well as the compelling guidance of the DOJ.

III. Title IV of the ADA

Mutual next points to § 501(c) of Title IV of the ADA as proof of Congress' intent to curtail the reach of Title III to insurance policies. Section 501(c) provides, in relevant part:

> Subchapters I through III of this chapter and Title IV of this Act shall not be construed to prohibit or restrict--
>
> (1) an insurer ... from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;
>
> ....
>
> Paragraph[ ](1) ... shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

42 U.S.C. § 12201. Mutual contends § 501(c) establishes a rule of construction. According to Mutual, § 501(c) exhibits Congress' intent to prohibit any construction of Article III that would impose an affirmative obligation on insurance companies to design policies in a certain way. By contrast, plaintiffs argue the inclusion of § 501(c) only reinforces the conclusion that Title III reaches the content of insurance policies.

***1195** [4] Plaintiffs' view of § 501(c) is in line with the predominant weight of authority. Section 501(c) has been commonly construed as a form of "safe harbor" provision for insurance companies. See, e.g., Modderno v. King, 82 F.3d 1059, 1063-64 (D.C.Cir.1996); Chabner, at 1190; Lewis, 982 F.Supp. at 1165-1166; World Insurance Co., 966 F.Supp. at 1207-08; Kotev, 927 F.Supp. at 1322. Under this safe harbor, the challenged underwriting practice or risk classification does not violate the ADA if it accords with "sound actuarial principles, reasonably anticipated experience, or bona fide risk classification," or does not otherwise constitute a "subterfuge to evade the purposes of the ADA." World Insurance Co., 966 F.Supp. at 1208, 1209 n. 6. Rather than signaling Congress' intent to broadly exempt insurance companies from the reach of Title III of the ADA, § 501(c)'s safe harbor provision manifests the contrary intent to subject insurance companies to the full scope of the ADA's anti-discrimination prohibitions. See Chabner, at 1190 ("If Title III were meant only to prevent insurance companies from denying persons with disabilities equal access to the physical plants of insurance offices, there would have been no need for Congress to include the safe harbor provision dealing with underwriting practices."); see also Kotev, 927 F.Supp. at 1322 (insurers would not need "this 'safe harbor' provision ... if insurers could never be liable under Title III for conduct such as the discriminatory denial of insurance coverage"). Mutual may later avail itself of § 501(c)'s safe harbor by demonstrating the caps placed on AIDS and ARC in plaintiffs' policies were consistent with

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sound actuarial principles, reasonably anticipated experience, or bona fide risk classification. However, § 501(c) does not support Mutual's argument that Title III of the ADA does not reach the content of insurance policies.

IV. The McCarran-Ferguson Act

[5] Mutual next argues that a straightforward application of the McCarran-Ferguson Act, 15 U.S.C. § 1012 et seq., precludes application of the ADA to insurance policy content. The McCarran-Ferguson Act provides, in relevant part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Under McCarran-Ferguson, unless a federal statute clearly provides otherwise, it must be construed as inapplicable to the business of insurance. See, e.g., U.S. Dept. of Treasury v. Fabe, 508 U.S. 491, 507, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 116 S.Ct. 1103, 1113, 134 L.Ed.2d 237 (1996). In essence, Mutual argues that Title III of the ADA does not satisfy this clear statement test. In particular, Mutual asserts that the only mention of insurance in Title III is the reference to "insurance office" in 42 U.S.C. § 12181(7). Mutual contends this minor reference does not exhibit the necessary intent to regulate the content of insurance policies, business or practices.

In response, plaintiffs and the DOJ argue that McCarran-Ferguson does not preclude application of Title III to the content of insurance policies. Mutual fails to demonstrate McCarran-Ferguson bars application of Title III to the content of its insurance policies for the two independent reasons pressed by plaintiffs and the DOJ. First, § 501(c) expressly provides that insurance underwriting practices shall not be used to evade the purposes of Title III. In this manner, the ADA "specifically relates to the business of insurance" for purposes of the McCarran-Ferguson Act. § 1012(b); see Barnett Bank, 116 S.Ct. at 1111-1113. In arguing to the contrary, Mutual limits its clear statement inquiry to the language of Title III. The question is whether the ADA as a whole contains sufficient specific references to the insurance industry, not whether a specific title within the ADA contains such references. Taking into account both the reference to "insurance office" in Title III and the language of § 501(c) in Title IV, the ADA contains sufficiently specific indicia of an intent to apply its prohibitions to the insurance underwriting practices.

Second, Mutual has not identified any state law that an application of Title III of the ADA would "invalidate, impair, or supersede." *1196 § 1012(b). Indeed, as plaintiffs note, Illinois insurance law consistently forbids Mutual's alleged discriminatory practice:

> No company, in any policy of accident or health insurance issued in this State, shall make or permit any distinction or discrimination against individuals solely because of handicaps or disabilities ... in the amount of any dividends or other benefits payable thereon, or in any other terms and conditions of the contract it makes, except where the distinction or discrimination is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

215 ILCS 5/364 (West 1997) (emphasis added). Where there is no conflict between the federal statute and state law, as in this case, the McCarran-Ferguson Act does not bar application of federal law. See, e.g., Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1363 (6th Cir.1995), cert. denied, 516 U.S. 1140, 116 S.Ct. 973, 133 L.Ed.2d 893 (1996); Merchants Home Delivery Serv. Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1491-93 (9th Cir.), cert. denied, 516 U.S. 964, 116 S.Ct. 418, 133 L.Ed.2d 335 (1995); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 295-97 (7th Cir.1992). Accordingly, application of Title III of the ADA to Mutual's policies is not precluded by the McCarran-Ferguson Act.

V. ADA Discrimination

[6] Mutual argues that AIDS/ARC caps do not constitute discrimination against individuals "on the basis of a disability," 42 U.S.C. § 12182(a), because they are a permissible distinction in the level of benefits provided to one category of disability as differentiated from other categories. Mutual finds support for this argument in a trio of appellate decisions addressing challenges under the ADA and the Rehabilitation Act, 29 U.S.C. § 794, to employer health benefit plans or long term disability plans that provide inferior benefits for mental disabilities, as compared to physical disabilities.

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See, e.g., EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir.1996); Modderno v. King, 82 F.3d 1059 (D.C.Cir.1996); Parker, 121 F.3d 1006. These cases uniformly reject the notion that providing unequal benefits as between the broad categories of mental and physical disabilities constitutes cognizable discrimination. EEOC, 96 F.3d at 1044; Modderno, 82 F.3d at 1061; Parker, 121 F.3d at 1015-16. In sum, Mutual urges that because its policies similarly provided different levels of benefits for different disabilities the AIDS/ARC caps are not discriminatory under the ADA.

Mutual's attempt to make plaintiffs' claim fit the rule of EEOC, Parker, and Modderno fails because these cases are inapposite. Unlike the claims in each of those cases, the ADA claim in this case focus on Mutual's singling out of individuals with a particular disability, AIDS, for inferior coverage as compared to that afforded non-disabled individuals. Indeed, the Parker court specifically distinguished differentiation between broad categories of individuals with different disabilities from the discrimination prohibited by the ADA--discrimination between the disabled and non-disabled. 121 F.3d at 1014. Similarly, the Seventh Circuit distinguished its decision from a case where an insurer chooses "to vary the terms of its plan depending on whether the employee was disabled." EEOC, 96 F.3d at 1044. The alleged discrimination at issue here is well-illustrated by plaintiffs' hypothetical example. Mutual will provide coverage of up to $1 million dollar for hospitalizations related to pneumonia for non-disabled individuals. Whereas if the pneumonia presents itself as a complication of AIDs, it is deemed an aids related condition (ARC) and subject to the AIDS/ARC cap. If, for instance, Smith had already exhausted his $25,000 dollar limit for AIDS related care, he would be denied coverage for pneumonia treatment. A non-disabled individual who had not reached the $1 million dollar cap would not be denied coverage. Further, even if that non-disabled individual had exhausted his $1 million dollar maximum, he would be entitled to a reinstatement of benefits, provided he did not incur any expenses for two consecutive calendar years. The same reinstatement benefit is not provided to disabled persons after exhaustion of the AIDS/ARC cap. This example exposes the discriminatory nature of Mutual's policies--they subject plaintiffs to altogether different terms and conditions than non-disabled individuals. In sum, plaintiffs' allegations of differential treatment on the basis of AIDS are sufficient to state a *1197 cognizable claim of discrimination in violation of Title III of the ADA.

VI. Section 364 of the Illinois Insurance Code

In Count II, plaintiffs seek to state a claim for violation of § 364 of the Illinois Insurance Code. 215 ILCS 5/364. As noted above (see part IV), § 364 provides:

> No company, in any policy of accident or health insurance issued in this State, shall make or permit any distinction or discrimination against individuals solely because of handicaps or disabilities ... in the amount of any dividends or other benefits payable thereon, or in any other terms and conditions of the contract it makes, except where the distinction or discrimination is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

215 ILCS 5/364 (West 1997) (emphasis added). Conceding that the Illinois legislature has not seen fit to provide a private remedy for violations of this section of the IIC, plaintiffs argue that this court should find an implied right of action under the statute.

[7] Plaintiffs argue that an implied right of action should be found under the rationale expressed in Sawyer Realty Group, Inc. v. Jarvis Corp., 89 Ill.2d 379, 59 Ill.Dec. 905, 432 N.E.2d 849, 854-855 (1982). In Sawyer the Illinois Supreme Court articulated the following elements useful to the determination whether there is an implied right of action under a state statute:

1. The plaintiff is a member of the class of persons for whose benefit the statute was enacted;
2. The plaintiff's injury is one which the statute was designed to prevent;
3. A private right of action is consistent with the underlying purpose of the statute; and
4. A private right of action is necessary to effectuate the purposes of the act.

See id. Except perhaps for the first element, none of the other Sawyer elements counsels in favor of finding an implied right of action. Although the IIC benefits insurance customers, its primary concern is direct regulation of the insurance industry. There is no authority for the proposition that the underlying purpose of IIC, in particular Article XX ("Accident and Health Insurance"), was to redress discrimination by insurers. Moreover, creation of

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an implied private cause of action under § 364 is not necessary to effectuate the statutory purposes of the IIC because it specifies remedies for the section's violation. See Langendorf v. Travelers State Ins. Co., 625 F.Supp. 1103, 1106 (N.D.Ill.1985) (no need for implied private right of action under IIC because Director of Insurance empowered to issue cease and desist orders against insurer who commits proscribed acts). For example, section 5/730 provides that "any company, or any officer or agent thereof, issuing or delivering to any person in this State any policy in wilful violation of the provision of this article shall be guilty of a petty criminal offense." 215 ILCS § 5/370(1). Further, the Director of Insurance is empowered to revoke or suspend the license of a foreign or alien company wilfully violating the article or to order payment of a monetary penalty. 215 ILCS § 5/730(2). Thus, implication of a private cause of action under § 364 is unwarranted.

In declining to recognize an implied right of action under § 364 of the IIC, the court is mindful of the fact that no Illinois court has found an implied private right of action under any provision of the Act. As courts of limited jurisdiction, federal courts are reluctant to effect dramatic expansions of state law absent indication from the state supreme court, or at the very least a clear line of state appellate court authority. See DeMent v. Abbott Capital Corp., 589 F.Supp. 1378, 1387 (N.D.Ill.1984) (refusing to imply private cause of action under the Illinois Securities Act where no Illinois court had ever held that an individual could pursue private remedies under the Act). Accordingly, plaintiffs' claim pursuant to § 364 of the IIC must be dismissed.

CONCLUSION

Plaintiffs adequately state a claim that the AIDS/ARC caps in Mutual's insurance policies constitute discrimination in violation of Title III of the ADA. In contrast, plaintiffs fail to state a claim under the IIC because this court finds no implied private right of ***1198** action. Accordingly, the motion to dismiss is granted in part and denied in part. Count II of the complaint is dismissed with prejudice. Defendant's motion is denied in all other respects.

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Exhibit B

Susan **WINSLOW**, Plaintiff,
v.
IDS LIFE INSURANCE CO., Defendants.

No. CIV. 3-96-75 MJD/AJB.

United States District Court,
D. Minnesota.

Sept. 30, 1998.

Roderick J. Macpherson III of the Minnesota Disability Center on behalf of the plaintiff.

John D. Thompson and Doreen A. Mohs of Rider, Bennett, Egan & Arundel, LLP, on behalf of the defendant.

MEMORANDUM AND ORDER

DAVIS.

*1 Susan M. Winslow filed this action for declaratory and injunctive relief and for damages under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and the Minnesota Human Rights Act ("MHRA"), Minn.Stat. § 363.01 et seq. when she applied for and was denied long-term disability insurance by IDS Life Insurance Co. due to her current history of treatment for a mental health condition. The matter is before the Court on Defendant's motion for summary judgment which, for the foregoing reasons, is denied in part and granted in part.

BACKGROUND

On approximately October 27, 1994, Plaintiff Susan Winslow applied to IDS Life Insurance Co. for standard long-term disability insurance or, in the alternative, long-term disability insurance with a rider excluding coverage for periods of disability due to her mental health condition. Plaintiff indicated on her application that she had been treated for mental illness--dysthymia or mild depression [FN1]--within the past year and was currently taking Zoloft, an anti-depressant. IDS refused both requests for insurance based on its policy of automatically denying long-term disability insurance to applicants who report having received treatment for a mental or nervous condition, regardless of seriousness, within the twelve months prior to application. IDS policy allows such applicants to be reconsidered for long-term disability insurance after a year has passed since their last treatment for a mental or nervous condition. IDS asserts that its above-stated policy is based on industry-wide claims experience and actuarial data that indicates that the highest number of payments are made for depression-related claims. Plaintiff notes, however, that the IDS policy differs from that in the Paul Revere Underwriting Manual-a manual used by IDS in making other underwriting decisions-which does not require automatic rejection of applicants with current histories of mental or nervous conditions, such as Plaintiff's dysthymia, but instead provides for a long-term disability insurance policy with a longer exclusion period. (Plaintiff's Mem. Opp. Summ. J. at 4).

Plaintiff received notice of the denial of her long-term disability insurance application in November 1994 and requested reconsideration. In her request for reconsideration Plaintiff asserted to IDS that she had never been hospitalized or missed work due to her mental health condition and provided corroborative letters from two psychiatrists from whom she had received treatment, affirming that Plaintiff suffered only mild symptoms, which did not manifest themselves in work situations. Plaintiff also submitted to IDS letters of support from former and current employers praising her work performance. IDS received Plaintiff's additional documents, and after internal discussions, agreed that denial of Plaintiff's application was appropriate.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate if the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex v. Catrett, 477 U.S. 317, 322- 23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Unigroup, Inc. V. O'Rourke Storage & Transfer Co., 980 F.2d 1217, 1219-20 (8th Cir.1992); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1315 (8th Cir.1996). The

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burden of demonstrating the absence of any genuine issue of material fact rests on the moving party. Fed.R.Civ.P. 56(b); Celotex, 477 U.S. at 323. To defeat summary judgment when a properly supported motion for summary judgment is made, however, the non-moving party must go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Anderson, 477 U.S. at 250.

II. Disability Under the ADA

*2 In order to defeat summary judgment plaintiff Winslow must demonstrate that she is a person with a disability as defined by the ADA and therefore a plaintiff covered by the ADA. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C). Winslow does not argue that she meets criteria (A) or (B) of the ADA definition. Instead, Plaintiff asserts that IDS regarded her as disabled and treated her as having "a physical or mental impairment that substantially limits one or more of the major life activities," in this case, her future ability to work. See, Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir.1995), (citing 29 C.F.R. § 1630.2(1)(3)).

The relevant Equal Employment Opportunity Commission ("EEOC") regulations define "regarded as having an impairment" as:

> (i) having a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation; (ii) having a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; (iii) having none of the impairments defined in ... [above] but treated by a private entity as having such an impairment.

Aucutt, 85 F.3d at 1319-1320 (citing 28 C.F.R § 1630.2(1)(1)-(3)). Both the ADA and EEOC regulations establish that a plaintiff, such as Winslow, whose claim asserts only that she was regarded by a defendant as having a substantially limiting impairment, need not prove that she in fact suffered such impairment. As a result, although both parties present conflicting views as to whether Winslow's dysthymia falls within the ADA definition of "impairment," this Court need not reach the question and requires only that Plaintiff demonstrate that she was "regarded as having such an impairment" by IDS, as she so asserts.

Plaintiff claims that the "major life activity" that Defendant perceives as "substantially limited" by her dysthymia is her future ability to work. It is undisputed that work is a "major life activity," which if substantially limited or regarded as substantially limited by a significant impairment qualifies a person as disabled under the ADA. Wooten. 58 F.3d at 385, (citing 29 C.F.R. § 1630.2(i)); see also Thompson v. Holy Family Hospital, 121 F.3d 537, 541 (9th Cir.1997), (citing Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907, 913 (11th Cir.1996)).

This Court finds, as a matter of law, that when IDS denied Plaintiff Winslow's application for long-term disability insurance based on her depression and anxiety, diagnosed as dysthymia, IDS implicitly considered her to be "impaired" and likely unable to perform "either a class of jobs or a broad range of jobs in various classes" in the future. The Court finds that although no IDS documentation explicitly indicates that Plaintiff was regarded as disabled, perceptions regarding an applicant's future inability to work are the only logical criteria upon which denial of long-term disability insurance, which insures only against the loss of income caused by the inability to work due to a disability, would be based. The Court's finding is supported by Defendant's explanation for its eligibility criteria--that highest payments are going out for claims due to mental or nervous conditions.

*3 Defendant asserts that even if Plaintiff can show that IDS regarded her as likely to suffer a substantially limiting impairment in the future, she has failed to show that IDS regarded her as disabled at the time it denied her application for long-term disability insurance as required by the statutory language of the ADA, which contains no future tense. See 42 U.S.C. § 12102(2)(C) ("regarded as having such an impairment")(emphasis added). In support of its narrow reading of the "regarded as" provision of the ADA, Defendant cites Glidden v. County of Monroe, 950 F.Supp. 73, 77 (W.D.N.Y.1997)(defendant's fear that plaintiff would suffer from a mental disability in the future did not render the ADA applicable) and Pater v. Deringer Mfg. Co., 1995 WL 530655 (N.D.Ill.)

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(the court was "not persuaded by Plaintiff's contention that the perception or fear that a future disability may occur should render the ADA applicable"). The courts in both Glidden and Pater, however, determined that plaintiffs had failed to make the threshold showing that defendants perceived that they suffered or would suffer disabilities. Therefore, determination as to whether the ADA would have applied to the defendants' hypothetical fear of a plaintiffs' future disabilities was merely dicta.

In Doukas v. Metropolitan Life Insurance Company, 1997 WL 833134 (D.N.H.), the court held that "the distinction between present and future limitations [in the ADA] is not dispositive." 1997 WL 833134 at *5. In Doukas, Plaintiff Susan Doukas applied for and was denied mortgage disability insurance by MetLife. MetLife based its denial on information in Doukas' application indicating that she had been diagnosed with and was being treated for bipolar disorder and was therefore likely to become totally disabled from work in the future. MetLife moved for summary judgment on the grounds that Doukas did not fall within the ADA definition of disabled because she was not regarded as currently disabled and incapable of working but rather as presenting a future risk of disability. The court denied MetLife's motion, finding that "the 'regarded as' definition of disability seeks to eradicate discrimination based on prejudice or irrational fear. Fear, almost by definition, refers not to actual present conditions, but to anticipated future consequences." Id. at * 4. Courts have noted that the perception of impairment is included by Congress within the definition of disabled to combat the effects of " 'archaic attitudes,' erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." Wooten, 58 F.3d at 385 (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 & 285, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987)). In this light, the Doukas court noted that to limit ADA protection to instances in which the defendant regards the plaintiff's substantially limiting impairment as immediate would contradict Congressional intent and "allow an employer to refuse to hire an epileptic as long as the job applicant was not having a seizure at the time." Doukas, at *4. [FN2]

*4 This circuit has not addressed the question of whether the ADA definition of perceived impairment requires that a defendant regard a plaintiff as having a present substantially limiting impairment or whether the statute is satisfied by a defendant's perception of likely future inability to perform a major life activity. This Court finds the reasoning set forth in Doukas persuasive and holds that the purpose of the ADA requires that ADA protection extend to cover perception of possible future disability.

III. Applicability of the ADA to Insurance Policies

Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Section 12181(7) provides an illustrative list of entities considered public accommodations for the purposes of Title III. See Parker v. metropolitan Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir.1997); Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc., 37 F.3d 12, 19 (1st Cir.1994). The issue before this Court is whether "public accommodations" are limited to actual physical structures or whether Title III of the ADA prohibits more than physical impediments to public accommodations for the disabled. This issue is one of first impression for the Eighth Circuit and has been decided only by the First and Sixth Circuits, which split on the matter, and a smattering of district courts, some of which have followed the First Circuit in Carparts and others of which have adopted the reasoning of the Sixth Circuit in Parker.

In Parker, the Sixth Circuit reviewed the regulations applicable to Title III of the ADA to interpret "places" of public accommodation and found that a "place," as defined by 28 C.F.R. § 36.104, is "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve 'public accommodation' categories." Parker, 121 F.3d at 1011. A "facility," in turn, is defined by 28 C.F.R. § 36.104 as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking

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lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." Parker, 121 F.3d at 1011. The court concluded that the plain meaning of the statutory language and the applicable regulations is that places of public accommodation are limited to physical places open to public access. Id. at 1011, 1014. See also Erwin v. Northwestern Mutual Life Insurance Company, 999 F.Supp. 1227, 1231 (S.D.Ind.1998); Pallozzi v. Allstate Life Insurance Company, 998 F.Supp. 204, 1998 WL 139410 at *2-*3 (N.D.N.Y.); Leonard F. v. Israel Discount Bank of New York, 967 F.Supp. 802, 805 (S.D.N.Y.1997); Pappas v. Bethesda Hosp. Ass'n, 861 F.Supp. 616, 620 (S.D.Ohio 1994).

*5 In Carparts, the First Circuit reached the opposite conclusion, determining that "public accommodations" are not limited to actual physical structures. Kotey v. First Colony Life Insurance Company, 927 F.Supp. 1316 (C.D.Cal.1996) followed the Carparts holding and addressed the issue at greater length. Kotey noted that the limited interpretation of "public accommodation" adopted by the Parker court would contravene the broadly stated purpose of the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities ... and invoke the sweep of congressional authority ... in order to address the major areas of discrimination faced day-to-day by people with disabilities ." Kotey, 927 F.Supp. at 1321 (citing 42 U.S.C. § 12101(b)(1, 4)); See also Doukas v. Metropolitan Life Insurance Company, 950 F.Supp. 422, 427 (D.N.H.1996).

"Disability" under the ADA includes both physical and mental impairments as well as those with records of or regarded as having such impairments. See 42 U.S.C. § 12102(2)(A)-(C). By restricting "public accommodations" to include only physical structures, the protection under the ADA for individuals with mental disabilities would be virtually negated, absent circumstances in which a physical structure denied access to the mentally impaired. Kotey, 927 F.Supp. at 1322.

Especially relevant to the present case is ADA statutory language that would be rendered irrelevant if Title III were held to apply only to physical access to public accommodations:

> (i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary ...
> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities ...
> (iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence.

42 U.S.C. § 12182(b)(2)(A)(i-iii); see also, Doe v. Mutual of Omaha Insurance Company, 999 F.Supp. 1188, 1193 (N.D.Ill.1998); Doukas, 950 F.Supp. at 426 (D.N.H.1996); Cloutier v. Prudential Ins. Co., 964 F.Supp. 299, 302 (N.D.Cal.1997); Chabner v. United of Omaha Life Insurance Company, 994 F.Supp. 1185, 1190 (N.D.Cal.1998); Kotey, 927 F.Supp. at 1322. Also rendered superfluous by such a narrow interpretation would be the Title III provision for injunctive relief set forth in 42 U.S.C. § 12188(a)(2) that "shall also include requiring the ... modification of policy."

*6 Further supporting the conclusion reached by Kotey and a growing number of district courts--that ADA Title III applies to the provision of insurance policies--is the "Safe Harbor" provision of Title III, specifically addressing insurance. If Title III were not intended to apply to insurance policies, the Safe Harbor provisions would also be superfluous. The Safe Harbor provision states, in relevant part:

> Subchapters I through III of this chapter and Title IV of this Act shall not be construed to prohibit or restrict-
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;
> ...
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter[s] I and III of this chapter.

42 U.S.C. § 12201(c). Courts have concluded, and this Court agrees, that the Safe Harbor provision

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would be superfluous if "insurers could never be liable under Title III for conduct such as discriminatory denial of insurance coverage." Kotey, 927 F.Supp. at 1322; see also, Chabner, 994 F.Supp. at 1190-1191.

The interpretation of Title III set forth in the legislative history of the ADA as well as by the U.S. Department of Justice ("DOJ") also supports the theory that Title III of the ADA is intended to cover access to insurance policies offered by public accommodations. The DOJ interprets Title III as prohibiting "differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified." Doukas, 950 F.Supp. at 427 (citing 28 C.F.R. pt. 36, subpart B, § 36.212); see also Doe v. Mutual of Omaha Insurance Company, 999 F.Supp. at 1194. Both the Senate and the House have determined that said justification must "be based on sound actuarial principles or be related to actual or reasonably anticipated experience." Kotey, 927 F.Supp. at 1323 (citing H.R.Rep. No. 485, 101st Cong., 2d Sess. at 71, U.S.C.C.A.N. at 353; S.Rep. No. 116, 101st Cong., 2nd Sess. At 84-86, U.S.C.C.A.N. at 366-369); see also Chabner, 994 F.Supp. at 1191.

Based on the legislative history, the DOJ interpretation of Title III of the ADA, and the reasoning adopted by a growing number of district courts, this Court finds that Title III of the ADA is applicable to insurance policies and not limited to access to actual physical structures.

A. The McCarran-Ferguson Act

Defendant argues that the McCarran-Ferguson Act, 15 U.S.C. § 1012 et seq., precludes application of the ADA to insurance policies because Title III is not intended to regulate the business of private insurance carriers. The McCarran- Ferguson Act provides, in relevant part:

> No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically related to the business of insurance.

*7 15 U.S.C. § 1012(b), cited in Doe v. Mutual of Omaha Insurance Company, 999 F.Supp. at 1195; Leonard, 967 F.Supp. at 805. The McCarran-Ferguson Act bars the application of a federal statute if:

> (1) the statute does not specifically relate to the business of insurance; (2) a state statute has been enacted for the purpose of regulating the business of insurance; and (3) the federal statute would invalidate, impair, or supersede the state statute.

Doe v. Norwest Bank Minnesota N.A., 107 F.3d 1297, 1305 (8th Cir.1996) (citations omitted). In Doe v. Norwest Bank Minnesota, the Eighth Circuit addressed the application of the McCarran-Ferguson Act in the context of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In Doe v. Norwest Bank Minnesota, both parties agreed that RICO does not specifically relate to the business of insurance and that Minnesota has enacted a "comprehensive statutory scheme to regulate the business of insurance." Id at 1306. The only issue in dispute before the Eighth Circuit was therefore whether the application of RICO would "invalidate, impair, or supersede" Minnesota's insurance laws, which were parallel in substance to RICO but provided for different remedies. Id. The court noted that while relevant Minnesota law allowed only for administrative agency enforcement rather than a private cause of action and provided only for possible fines and injunctive relief, RICO expressly grants treble damages, costs, and attorney fees to victorious plaintiffs. Id at 1306. The court determined that the RICO recovery was "significantly greater than that which the state has authorized" by providing "remedies .. among the most severe ever enacted in a federal civil statute." Id. at 1306-07 (citations omitted). The cour. therefore held that because of the severity of the RICO remedies, their application to the present case would "impair" Minnesota's regulatory scheme. Id. at 1307-1308.

The present case can be distinguished from Doe v. Norwest Bank Minnesota, however, as the ADA, unlike RICO, is specifically related to the business of insurance and the ADA does not impair, invalidate, or supersede relevant Minnesota state law.

This Court identifies two fundamental provisions of the ADA that specifically relate to the business of insurance. The Court finds that the "subterfuge" provision of the ADA, see supra, 42 U.S.C. § 12201(c), which prohibits the use of the Safe Harbor provision to evade the purpose of Title III of the ADA is a statutory provision specifically related to

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the business of insurance. See Doe v. Mutual of Omaha Insurance Company, 999 F.Supp. at 1195. The Court also interprets the inclusion of an "insurance office" as an entity considered a public accommodation for the purposes of Title III of the ADA, see 42 U.S.C. § 12181(7)(F), as an explicit indication that the ADA is intended to specifically relate to the business of insurance.

*8 Even if the Court had concluded otherwise, however, the McCarran- Ferguson Act would be inapplicable to the present case. As with the RICO provisions in Doe v. Norwest Bank Minnesota, the substantive provisions of the ADA and the relevant Minnesota statutes are similar in the present case. See infra, Minn.Stat. § 72A.20, subd. 9, 19. Unlike RICO, however, the ADA does not provide for extraordinarily punitive damages--treble damages, costs, and attorney fees-and therefore does not allow damages so substantial that they impair the regulatory scheme established by Minnesota state law. To the contrary, as both parties agree, Title III of the ADA does not provide for punitive damages. See 42 U.S .C. § 12188, § 2000a-3. The present case can therefore be distinguished from Doe v. Norwest Bank Minnesota and instead compared to National Association for the Advancement of Colored People v. American Family Mutual Insurance Company, 978 F.2d 287 (7th Cir.1992). In NAACP, the court held that the federal Fair Housing Act, which provides for a private cause of action, did not supersede, impair, or invalidate the substantively similar applicable Wisconsin statues which can only be enforced by administrative agencies. The court found that "in the main, federal regulation of a subject... does not prevent states from adding remedies to the arsenal established by federal law. The McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict with ... federal law are pertinent in deciding when federal rules 'invalidate, impair, or supersede' state rules." Id. at 296. The court in NAACP held that as "duplication is not conflict" and that, as a general rule, "state and federal rules that are substantively identical but differ in penalty do not conflict with or displace each other," the McCarran-Ferguson Act did not bar plaintiff's Fair Housing Act claims. Id. at 295, 297. This Court finds the reasoning in NAACP persuasive and apposite to the present case and therefore holds that the McCarran-Ferguson Act does not "invalidate, impair, or supersede" the relevant Minnesota statutes and does not bar plaintiff's ADA claims.

IV. The Safe Harbor Provision

As indicated above, the ADA provides a Safe Harbor provision for insurance providers under the ADA. See supra, 42 U.S.C. § 12201(c). Under the Safe Harbor provision, the risk underwriting engaged in by insurance companies must be based on or not inconsistent with state law. Chabner, 994 F.Supp. at 1191. The subterfuge provision, see supra 42 U.S.C. § 12201(c), provides, however, that even if an insurer's practices are consistent with applicable state law, they can still violate the ADA if plaintiff demonstrates that the insurance policies are a subterfuge to evade the purpose of the ADA. See Doukas, 950 F.Supp. at 430. Thus, the Court must perform a two-part analysis to determine whether the IDS policies in question violate the Safe Harbor provision of the ADA: (1) is the eligibility criteria employed by IDS based on and consistent with state law; and (2) is the eligibility criteria a subterfuge to evade the purposes of the ADA.

*9 Minn.Stat. § 72A.20 provides in relevant part:

Subd. 9. Discrimination between individuals of the same class. Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any terms or conditions of such contract, or in any other manner whatever, or in making or permitting the rejection of an individual's application for accident or health insurance coverage, as well as the determination of the rate class for such individual, on the basis of a disability, shall constitute an unfair method of competition and an unfair and deceptive act or practice, unless the claims experience and actuarial projections and other data establish significant and substantial differences in class rates because of the disability.

Subd. 19. Support for underwriting standards. No life or health insurance company doing business in this state shall engage in any selection or underwriting process unless the insurance company establishes beforehand substantial data, actuarial projections, or claims experience which support the underwriting standards used by the insurance

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company. The data, projections, or claims experience used to support the selection or underwriting process is not limited to only that of the company. The experience, projections, or data of other companies or a rate service organization may be used as well.

Minn.Stat. § 72A.20, subd. 9, 19. IDS categorically denies long-term disability insurance to any applicant who has been treated for a mental health condition within the past year, allowing the applicant to be reconsidered after one year has passed since the last treatment. To comply with Minnesota law, IDS must justify such eligibility criteria with claims experience, actuarial projections, or other data to "establish significant and substantial differences in class rates because of the disability." Id. at subd. 9.

IDS asserts that it has presented such justification for its eligibility criteria and therefore does not violate state law. The Court acknowledges that IDS presents specific industry data based on claims experience and actuarial projections that show a dramatic increase in payments on long-term disability insurance claims due to mental health and nervous disorders. Plaintiff counters that while Defendant establishes that claims for disability due to mental or nervous conditions have increased since 1989, Defendant fails to demonstrate that individuals receiving treatment for mental or nervous conditions at or near the time of application for insurance are more likely to file claims under their long-term disability insurance. Furthermore, Plaintiff notes that the Paul Revere Underwriting Manual includes various impairments, such as dysthymia, and establishes procedures for processing applications from individuals with such impairments without recommending total denial of insurance for such applicants. Implicit in Plaintiff's observation is a challenge to the "substantial" actuarial data and claims experience presented by Defendant and their applicability to Plaintiff's situation. Thus, Plaintiff claims that a genuine issue of material fact exists as to whether IDS' long- term disability insurance eligibility criteria conforms to sound actuarial principles, claims experience, or substantial data as required by Minnesota state law. The Court agrees and denies summary judgment on the matter.

*10 Defendant also asserts that it is entitled to Safe Harbor protection under Title III of the ADA because its eligibility criteria are not a subterfuge. See supra, 42 U.S.C. § 12201(c). The issue of subterfuge arises only if it is determined that Defendant's practices are based on or not inconsistent with Minnesota law. As this Court has determined that a genuine issue of material fact exists as to whether IDS eligibility criteria violates Minnesota law, the Court need not pass on the issue as to whether the criteria is a subterfuge of the ADA.

V. Disability-Based Distinction Under the ADA

Plaintiff asserts that the IDS policy of denying long-term disability insurance to all applicants having received mental health treatment within the past year is founded on a disability-based distinction violative of the ADA. Courts have found that broad-based distinctions that distinguish between mental and physical health conditions do not qualify as illicit disability-based distinctions under the ADA because the ADA is only applicable to discrimination against disabled persons compared to non-disabled persons, not discrimination among the disabled. See Parker, 121 F.3d 1006 (the ADA prohibits discrimination between the disabled and non-disabled but does not mandate equality between individuals with different disabilities); see also Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985); Modderno v. King, 82 F.3d 1059 (D.C.Cir.1996); Traynor v. Turnage, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618; Ford v. Schering-Plough Corporation, 145 F.3d 601 (3rd Cir.1998). Furthermore, the EEOC, Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance ("EEOC Interim Guidance"), [FN3] establishes the following:

Some employer provided health insurance plans ... [distinguish] between the benefits provided for the treatment of physical conditions on the one hand, and the benefits provided for the treatment of "mental/nervous" conditions on the other ... Such broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability.

Krauel, 95 F.3d at 678 (citing EEOC Interim Guidance, (June 8, 1993), reprinted in Fair.Empl.Prac.Man. 405:7115, 7118(BNA)(footnote omitted)).

The aforementioned cases and the EEOC Interim

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Guidance, however, address disability-based discrimination among the disabled that affects the quality and extent of coverage offered to one class of disabled as compared to another and do not address the categorical denial of access to insurance coverage to a class of disabled individuals. When courts have addressed the exclusion of a class of disabled from an insurance plan, they have found such exclusions violative of the ADA. In Ford, 145 F.3d at 608, the Third Circuit held, "So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities" (emphasis added). See also Parker, 121 F.3d at 1015-16 ("because all the employees at Schering-Plough, whether disabled or not, received the same access to the long- term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied"); EEOC v. CNA Ins. Companies, 96 F.3d 1039 (7th Cir.1996) (rejecting plaintiff's challenge to CNA's distinction between benefits for mental and physical illness on grounds that CNA did not discriminate because it offered its plan to everyone, did not charge higher prices to disabled-believing they might require more benefits-and did not vary terms of its plan depending on whether an applicant was able-bodied or disabled); Anderson v. Gus Maver Boston Store of Delaware, 924 F.Supp. 763 (E.D.Tex.1996)(finding that while the ADA allows some disability-based distinctions within insurance policies, when complete denial of coverage is at issue, disability based distinctions are impermissible).

*11 Legislative history of Title III of the ADA further supports the proposition that while disability-based distinctions in an insurance policy's terms are permissible under the ADA, a policy to deny insurance coverage categorically to mentally disabled is unacceptable:

> [W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience....
>
> [T]his legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness.

S.Rep. No. 116, 101st Cong. 1st Sess. (1989), cited in Doukas, 950 F.Supp. at 428 (emphasis added); see also H.R.Rep. No. 101-485, pt. 2, at 136-137 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 419-420, cited in Doe, 999 F.Supp. at 1193; Chabner, 994 F.Supp. at 1191. This Court finds that as Defendant's policy of denying long-term disability insurance to those treated for mental conditions within the past year denies said individuals access to insurance coverage, the policy is founded on a disability-based discrimination violative of the ADA.

VI. Minnesota Human Rights Act

The Minnesota Human Rights Act ("MHRA"), Minn.Stat. § 363.01, subd. 13, defines disability in terms similar to those used in the ADA. The Minnesota District Court has held that federal precedent may be used to construe the MHRA and that analysis under the ADA controls a MHRA claim. Reiff v. Interim Personnel, Inc., 906 F.Supp. 1280, 1292 (D.Minn.1995)(citing Sigurdson v. Carl Bolander & Sons, Inc., 532 N.W.2d 225, 227 (Minn.1995); State, by Cooper v. Hennepin County, 441 N.W.2d 106, 110 (Minn.1989); Heise v. Genuine Parts Co., 900 F.Supp. 1137, 1153-54 (D.Minn.1995)). This Court's analysis of Plaintiff's claim under the ADA developed above is therefore also applicable to her MHRA claim.

A. Punitive Damages

Plaintiff seeks punitive damages under the MHRA. In order to recover punitive damages under the MHRA, Plaintiff must meet the standard set forth in Minn.Stat. § 549.20:

> Subd. 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.
>
> Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the

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misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

*12 Minn.Stat. § 549.20, Subd. 1, 3. Considering the factors articulated in Minn.Stat. § 549.20, this Court finds as a matter of law that the eligibility criteria for IDS' long-term disability insurance does not demonstrate willful indifference to Plaintiff's rights and therefore does not warrant punitive damages. The Court therefore grants Defendant's motion for summary judgment on the matter of punitive damages.

ORDER

Accordingly, based on the foregoing and all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

Defendant's motion for summary judgment is GRANTED as to plaintiff's claim for punitive damages under the MHRA and DENIED in all other respects.

FN1. Dysthymia is a mental condition characterized by mild, chronic depression that is treatable with medication and counseling and is recognized as a disorder in both the Diagnostic and Statistical Manual of Mental Disorders and Paul Revere Underwriting Manual. (Plaintiff's Mem. Opp. Summ. J. at 3).

FN2. The Doukas court noted that courts have avoided construing narrowly the "regarded as" definition of the ADA, citing Cook v. Rhode Island Dept. of Mental Health, Retardation, and Hosps., 10 F.3d 17 (1st Cir.1993), in which the court upheld a finding of perceived impairment based in part on an employer's fear that plaintiff's obesity created a heightened risk of future heart attack, and Doe v. New York Univ., 666 F.2d 761 (2d Cir.1981), in which the court held that NYU regarded plaintiff as impaired when it refused to readmit a plaintiff who it determined posed "an unacceptable risk to faculty, students, and patients." Doukas at *5 (citing Doe, 666 F.2d at 775).

FN3. The EEOC has not issued guidelines specifically addressing ADA application to long-term disability insurance.

END OF DOCUMENT

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1/6/99

CERTIFICATE OF SERVICE

In the

Supreme Court of the United States

October Term, 1998

No. 98-529

COLLEEN V. FORD,

Petitioner,

- v –

SCHERING-PLOUGH CORPORATION,
SCHERING CORPORATION,
METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

I hereby certifiy that I am this day serving the foregoing document (1) copy upon the person(s) and in the manner indicated below. Service by federal express addressed as follows:

Thomas F. Campion, Esq.
Shanley & Fisher
131 Madison Avenue
Morristown, New Jersey 07962-1979

Allan M. Marcus, Esq.
Metropolitan Life Insurance Company - Law Dept.
One Madison Avenue
New York, New York 10010-3690

Signed under the Pains and Penalty of Perjury

BY: _____
BRIAN J. MOLLOY, ESQUIRE
Counsel of Record
MAUREEN S. BINETTI, ESQUIRE
CHRISTOPHER W. HAGER, ESQUIRE
Wilentz, Goldman & Spizter
90 Woodbridge Center Drive
Suite 900, P.O. Box 10
Woodbridge, NJ 07095-0958
(732) 636-8000
Attorneys for Petitioner